IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL DISTRICT
OF JONES COUNTY, MISSISSIPPI

ESTATE OF BURL BUTLER,

Plaintiff,

vs. CASE NO. 94--5-53

PHILIP MORRIS, INC., et al.,

Defendants.

COPY

VOLUME II

DEPOSITION OF: J. KENDRICK WELLS, III

DATE: February 2, 1996

TIME: 9:35 AM

LOCATION: Law Offices of
Brown, Todd & Heyburn
3200 Providian Center
Louisville, KY

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: A. WILLIAM ROBERTS, JR.,
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(The following proceedings transpired off the video record.)

MR. BERNICK: Let the record reflect this is the second day of the deposition of Kendrick Wells. There are two matters that I would like to make a matter of record. One is that we have gone back to examine Judge Landrum's Order on the privileged status of the documents that were stolen from Brown & Williamson, and we have reviewed not only the order, but the underlying recommendation of the special master.

And having done so, we regard it as clear that Judge Landrum's Order determined and governed the privileged status of those documents, not only submitted by Brown & Williamson, but the additional UCSF documents that were provided to the Court.

And, therefore, that his order would abolish for purposes at least in the Butler case our claims of privilege with regard to the totality of the UCSF documents submitted to the Court. That is different from what I said yesterday, because I was not operating with full information.

I take it you would agree with my interpretation, Mr. Motley?

MR. MOTLEY: Well, I agree with what I

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said yesterday, and I don't think that's much different from what you said, except that we also provided the Court with our copies of the UCSF documents, and I think maybe we are off the same page of music now, unless you contend that all the judge had before him from UCSF was a truncated version of the taxonomy and the master summary, because we provided him with full copies. I think we are saying the same thing, but I don't want to get --

MR. BERNICK: It is our position that it is clear from the record's order that the Court ruled that not only with the UCSF documents that we submitted but the UCSF documents y'all submitted.

MR. MOTLEY: Do you agree that the UCSF documents that Plaintiff submitted included full copies of the master summary?

MR. BERNICK: I don't have any information to confirm that one by one. I will take your word for it.

MR. MOTLEY: We think we did. One of them is 48 pages and the other one is 64 pages; and as I said yesterday, we called out there to confirm that what is, in fact, there are the pages that we gave to Judge Landrum.

MR. BERNICK: Okay, so we are in accord

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on this one?

MR. MOTLEY: Yes, I believe so.

MR. BERNICK: The second point pertains to the video taking of the deposition yesterday. I operated on the assumption that this videotape would be done in compliance with the Court's trial setting and scheduling order of January 17 of this year. That order is explicit in calling out that at all times, with the sole exception of the beginning of the deposition when the camera pans for the introduction of counsel who are present, that at all other times the camera is to be focused on the witness and that's set forth explicitly in paragraph 18 J.

It says: The camera shall at all times include within its field of vision only the deponent and/or an exhibit offered into evidence. The camera shall remain stationery at all times during the deposition and shall not zoom in or out. The camera shall remain focused on the witness and shall not videotape any other person at the deposition except as set forth -- except as otherwise provided in subpart B of this order.

And, of course, subpart B is the part of the order when at the outset of the deposition,

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counsel introduce themselves. I believe that the provision that I have just read from the trial setting and scheduling order not only governs this case, but is fully consistent with what I understand the local rules to be. There is no provision that I am aware of, either in this order or anywhere else, which permits the camera to be focused on counsel defending the deposition or on any other aspect of this proceeding other than as is set forth in the order.

It came to my attention during the middle of the day yesterday when I started to see the camera move, that in point of fact, the terms of this order, as I understand it, and the terms of the local rules were not being followed. I inquired of the video operator and also opposing counsel in this matter.

I was told by the video operator that during the course of the morning, the camera had focused on me in defending the deposition at such times as objections were being made. I explained that I didn't think that was in compliance with the order. We felt that the order governed and that was an improper use of the camera.

In looking at the television coverage last night, it becomes apparent to me, it's obvious

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to me, that the camera not only focused on me during the course of objections, but more generally, the camera was focused on both the witness and defending counsel and, therefore, misrepresentations had been made to me yesterday about the nature and use of the camera.

It is further obvious to me that the purpose of this exercise was to indeed provide videotaped coverage to the press, which was very much in attendance yesterday, obviously for the purpose of calling into issue the assertion of privilege, which is a proper assertion of privilege, and the assertion of other objections during the course of the deposition.

We strenuously object to this use of the videotape camera in this process. We further believe that the video that's been generated in connection with this deposition ought not to be admissible at trial because it has not been properly taken, and I wanted to make that as a matter of record today, Counsel, because I don't think this videotape is useful.

MR. MOTLEY: Would you like for us to reschedule and start over, sir?

MR. BERNICK: Mr. Motley, I'm not going

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to get into what the discussions were between the video operator and yourself and, therefore, if there is any basis on whether you can seek to do that. Obviously, the deposition has taken place. I make an objection about the videotape and how it was taken the consequences will be determined later.

MR. MOTLEY: I have nothing to say other than the fact you did call it to my attention, provision 18. We were erroneous because in Mississippi there is no rule. And we are governed by the order. And when you brought it to my attention, we told the video operator that he was to keep it focused. I think he did that after you brought it to our attention.

As far as me serving as Mike Wallace's stalking horse, that's not true. I intend to, if the court permits -- I assume the court will rule on it at trial or maybe before, but I think any lawyer who practices much law in Mississippi knows that most judges prefer to handle it at the time of trial and in limine practice is a rare breed.

You were correct. You brought it to my attention. I object to any reference that I was doing it in order to stave the video. There are lawyers, as you know, who do such things as that, and

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they are not here today.

MR. BERNICK: The last point is scheduling.

MR. MOTLEY: Yes.

MR. BERNICK: And this is the one thing we may have to take up with the Court. I asked my colleague Mr. Hewes to take this matter up if we have to. We, of course, believe that the three-hour rule governs this deposition. We have obviously been flexible on that because we have exceeded the three-hour rule during the course of the deposition so far.

I have since gone back and taken a look at the deposition notice and also correspondence from Mr. Hoffman of King & Spalding with Plaintiff's' local counsel in this case. And both the notice and the correspondence made clear that the original intent was to have the deposition last no more than one day, and at the most two, i.e., supposed to be finished no later than this afternoon.

We are prepared to have the deposition continue on today, as you know. We are not prepared to have it go beyond today. We think that is inconsistent with the notice and inconsistent with the indications made by counsel for the plaintiffs.

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If you are amenable to that, we can finish up today; we can go ahead and proceed. If you feel you are entitled to have this deposition become a multiaffair beyond that, we may as well take it up with the court.

MR. MOTLEY: My position is very simple, and I think you said it very eloquently yesterday. The schedules of all these lawyers are difficult to coordinate; and while we are all here, why don't we press on, without any waiver of any position you might have on three hours or two days or one day or whatever. Obviously, since assertions of privilege were made by counsel yesterday for reasons good to them, those matters will have to be addressed at some point in time by the Court, and I think at that time when the Court decides whether the privilege objections obtain or not, we can address the issue of whether I have three hours or one day or two days.

But I think with due respect to everyone's schedule, we should proceed as far along today as we can, without you waiving anything. And I won't take any position, nor will I allow anyone who is on my side of the D to take a position that you waived anything, any rights, if we proceed on this morning and this afternoon or ever how you see fit.

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MR. BERNICK: If we're going to proceed along those lines, we will need a small space of time before the end of the day to conduct our own examination. I don't know that that will take very long.

MR. MOTLEY: As long as I'm not waiving anything by letting you step into the breach, okay?

MR. BERNICK: That sounds good.

MR. MOTLEY: It's amazing what reasonable people can accomplish in a short period of time.

MR. BIERSTEKER: I have one other matter. I asked you when you use exhibits to provide the Defendants with more than one copy. I think the failure to do so impairs the ability of the Defendants to represent their clients in a real meaningful way as to some of those facts.

And in point of fact, one of the exhibits yesterday, although I didn't realize it at the time because I didn't see it until after the deposition had concluded, for the day was a communication, exhibit number 11, between in-house counsel for Brown & Williamson and outside counsel for Brown & Williamson concerning the financing of CTR special projects, as to which I believe there is a joint defense privilege. And I would assert that objection

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now.

It is belated only because I didn't see the exhibit until afterwards. And if you could attempt to work with us to provide multiple copies, I would certainly appreciate it.

MR. MOTLEY: I will do the best I can. And, in fact, I asked my legal assistant to make a copy of the first exhibit that I know I'm going to use, and I do have two. But some of these things are voluminous, and I know our host will do everything he can to accommodate us, and I will try to do the best I can to anticipate.

MR. BIERSTEKER: Otherwise it might slow the deposition down.

MR. MOTLEY: By the way -- you don't have to comment on this -- is it the position of your client that 502 (b) exists in perpetuity, that is, that you can extend a joint defense privilege beyond one case on a one-time event?

MR. BIERSTEKER: Yes.

MR. NORTHRIP: I know we've got a general rule of one objection is for everybody?

MR. MOTLEY: Right.

(Off-the-record conference.)

MR. MOTLEY: I don't think we have to

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reswear the witness. I think he continues on, and everybody here knows that.

(The following proceedings transpired on the video and stenographic records.)

THE VIDEOGRAPHER: We're back on the record February the 2nd at 9:50 AM.

J. KENDRICK WELLS, III

being previously duly sworn, testified as follows:

EXAMINATION

BY MR. MOTLEY:

Q. Mr. Wells, do you attempt, to the extent you have the time available, to follow what your tobacco industry competitors are doing as reported in the lay press, different announcements of new brands, the announcements of research findings, opening of new plants and things like that?

A. I should, Mr. Motley, to be the complete lawyer, I guess. I find time is very limiting. When I have time, I read the newspaper articles, but I miss a lot of them.

Q. Have you ever heard of something called biomedical ethics field, the field of -- I don't want to call it science, because I don't really know what you'd call it, but have you ever heard of anything called biomedical ethics?

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A. I have heard of it, but ...

Q. Is there such a person employed by Brown & Williamson, to your knowledge, that is, a person who -- who is a specialist in what kinds of endeavors are ethical from the standpoint of the human population, application of science and medicine to humans?

A. Well, we switched from a field, which I have heard of, to a full-time specialist. I have never heard of a full-time specialist in biomedical ethics. We do not have a full-time specialist in biomedical ethics, but we have scientists who are up to date in their profession, and I'm sure they are quite cognizant of ethical issues.

Q. Do you have a scientist employed or a consultant retained whose job it is to pass counsel on -- I mean in a scientific sense -- to the corporation on matters which may touch upon biomedical ethics?

A. Our scientists consider ethical aspects and do so express them. I am unaware of whether they involved an outside consultant. They do, of course, keep up to date by going to scientific conferences. Those are standard topics, so I'm sure they are up to date on ethics and knowledgeable about it. I don't

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know whether they have physically brought in some outside consultant on that issue.

Q. Have you ever heard of a term called human experiments, the application of -- or the exposure of human beings to known toxins in order to see what happens as a result of the exposure?

A. A firm?

Q. A human experiment.

A. Have I ever heard of a human experiment?

Q. Yes. Do you remember Tuskeegee and the syphilis experiments, things like that? Do you know what I'm talking about?

A. No --

Q. You've never heard of that?

A. I haven't heard of Tuskeegee syphilis. I'm aware, of course, recently there has been press about some radioactivity experiments which were apparently conducted with absolutely no knowledge of the subjects.

Q. So you do have at least -- you have read about the -- about Ms. O'Leary and the retention of C. C. -- The Secretary of Department of Energy? It's O'Leary or Leary, whatever it is?

MR. BERNICK: O'Leary.

BY MR. MOTLEY:

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Q. O'Leary. And her announcement of the investigation into what you just referred to, that is, the exposure of people unknowingly to doses of radiation? Isn't that what you just referred to?

A. I referred to newspaper stories about it. I didn't recall the announcement of an investigation, but it probably makes sense.

Q. Has -- to your knowledge, has Brown & Williamson ever conducted experiments on human beings by exposing them to additives or toxins of cigarette smoke?

A. The term experiments there is pretty broad. It depends on what kind of experiment you mean. We have, to my knowledge, never done any experiment. We have never conducted any taste test, we have never asked anyone how do you think this cigarette tastes, without that subject's full knowledge that he or she was participating in a test and what the person was going to be exposed to and what it was.

We have -- our business is absolutely dependent upon the consumer liking our product and, in fact, preferring it to those of competitors. It's a necessity for us to ask consumers formed into groups, sometimes called panels, to smoke our

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cigarettes and tell us what they think. Someone might allege that's a toxin. Whatever it is, they are fully aware of exactly what they are going to be exposed to. It's cigarette smoke.

Internally at Brown & Williamson, our scientists work with flavorings that go into cigarettes, and our scientists do some of their own sort of sensory investigation of these products. They will put a proposed new flavoring in a product and smoke it. They may sniff it. They are scientists. They know what they are doing.

I'm not aware of any instance where people did not know what they were -- what was the element that was being investigated in a cigarette they were smoking. And the scientists who may occasionally smell a proposed flavoring know exactly what they are doing and what it is. We even formed a few years ago a panel to make sure that our scientists were going to continue to follow the kinds of -- the kinds of standards that we have had and want to continue to have.

We thought as our business was growing, we wanted -- and we had new people coming on, this panel that we formed has the responsibility to be aware of any tests where a human might be involved

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and to make sure that we continue to do it on the basis of, one, using safe conditions and, two, the full knowledge and consent by the people who are going to participate in the test.

Q. Okay.

A. And that panel -- if there is any question -- that panel considers what the answer ought to be.

Q. Sir, do you have a standard form that you use for these taste test panels where you -- as you say -- you fully disclose to them what it is they are doing and what they are being exposed to? Do you have a form like that?

A. I understand that we do --

Q. Okay.

A. -- but I have not seen it.

Q. Are you familiar with the material safety data sheets --

A. Yes.

Q. -- that accompany chemicals? Do you have a form similar to that when you have someone smoke a cigarette so they will know what ingredients are caused by the combustion of the materials and the condensation of the smoke?

A. That's interesting. I have never seen a

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material safety data sheet that talks about combustion by-products. The material safety data sheets do warn about consequences of abuse of what the Department of Transportation calls hazardous substances like alcohol can burn, acids can eat away the skin, and they are focused on -- they warn about the immediate, acute consequences that would occur from the full scale release of the chemical that's involved.

Usually we are talking about chemicals in a 50-gallon drum or whatever gallon drum it is, and the material in that safety data sheet is to warn workers who deal with those substances that it can -- it's flammable, it can burn, or it's caustic, it can eat away your skin, or other immediate acute consequences.

Q. Yes, sir. Perhaps you misapprehended my question. Being a products liability trial lawyer, I am intimately familiar with MSDS. My question to you, sir, is with the taste test panels, do you elaborate to them on what occurs when various chemicals that might be constituents of a tobacco product are heated, and the smoke condensate is released or taken into the body?

A. Our scientists make a judgment on whether

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the combustion -- I think it's called pyrolysis -- products would be harmful to a consumer before such a test is conducted. And depending on what the circumstances are -- let's think about a consumer taste panel. These are everyday consumers, not scientists. I don't think it's going to help them much to say that this particular flavorings in this cigarette may have some pyrolysis by-products that are different from the original substances, that the smoke from cigarettes already contains somewhere in excess of 3 to 4,000 different components.

So I don't think someone off the street is going to understand the meaning of that. What they understand is that they are smoking a cigarette, and our scientists have already made a judgment that the inclusion of the flavoring being tested is not going to alter that -- the smoke coming from that cigarette and would not present -- have determined that the favoring being added to the cigarette would not present a risk of harm to the smoker.

Q. Do they reduce these preexposure opinions in writing, your scientists?

A. I don't know.

Q. You don't know? Is it then your testimony that Scientist Jones will predetermine

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whether any harmful effects, in addition to that which may already be suspected might come from a cigarette, and he determines whether it will or it won't, but that that information is not passed on to the taste test panelist, or is it?

A. I'm sorry, which information?

Q. Well, you've got a scientist you just said who runs a test to satisfy himself that nothing -- no additional harm will inure to the taste test panelists, correct? Didn't you say that?

A. Well, I didn't say additional. I just said that the favoring being tested is not --

Q. Right. Okay, the new thing in it?

A. That's right.

Q. Okay. Does the scientist share that information and his opinions with the taste test panelist?

A. I think the taste test panel is entitled to assume that.

Q. Entitled to do what?

A. Assume that.

Q. Assume what?

A. That it is not being asked to smoke anything that would in -- that would present any risk not inherent in smoking cigarettes.

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Q. All right. Then that assumes that the risks inherent in smoking cigarettes have been predisclosed to the taste test panelists, correct?

A. You know, our cigarettes have statements on the side --

Q. Uh-huh.

A. -- prescribed by the United States Government. And they say some pretty direct things, that smoking causes lung cancer, smoking causes heart disease.

Q. Do you understand that term smoking causes lung cancer?

MR. BERNICK: Excuse me, were you done with your answer?

THE WITNESS: Yes.

BY MR. MOTLEY:

Q. You understand when someone says on the side of a pack of your cigarettes, not yours, your company's cigarettes, smoking causes lung cancer, you understand what that means? Is that what you are telling me? You understand the term smoking causes lung cancer as it appears on the side of your package, do you?

A. I'm not sure what you're getting -- I understand that's what it is intended to be is a

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warning to consumers.

Q. But do you understand it?

A. I'm not sure of the sense you're asking about here.

Q. Well, if there is a pack of cigarettes that says smoking causes lung cancer --

A. Yes.

Q. -- you as a human being, do you understand what that means?

A. Well, I think so.

Q. Okay. I'm not quibbling. I just want to make sure we are on the same page of music here.

Now, other than what might appear on the cigarette panels, is it your testimony that no additional information is imparted to the taste test panelists?

MR. BERNICK: Objection. Lack of foundation. Answer if you can.

THE WITNESS: No additional information?

BY MR. MOTLEY:

Q. About health risks.

A. About health risks?

Q. Or toxins that are -- that come out in the smoke condensate.

MR. BERNICK: Same objection. Lack of

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foundation.

MR. BIERSTEKER: Object to the form.

THE WITNESS: If we are thinking now about a consumer panel smoking cigarettes --

BY MR. MOTLEY:

Q. Yes.

A. -- I think they are entitled to assume that these are cigarettes like any other cigarettes in terms of their smoking and health situation.

Q. Now, when were these taste test panels first created, sir?

A. I don't know.

Q. Is there a section in the taxonomy and the master summary that deals with taste test panels; do you know?

A. I do not know.

Q. Do you know whether the taste test panel existed prior to 1970?

A. I didn't join the company until 1972, and I have never seen anything that addresses your question one way or the other.

Q. What name would you give me in the company who would be most knowledgeable about the history of the creation of the taste test panel?

A. Mr. Motley, I don't think we have anyone

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who has personal history with the company who is a current employee prior to 1970.

Q. Well, who is the most knowledgeable person, period, about the taste test panel? In other words, what department does that fall under?

MR. BIERSTEKER: Object to the form.

THE WITNESS: My recollection is it's -- the taste test panels are conducted -- I'm not certain, because we're talking about different kinds of panels. We use -- our own scientists sometimes come together to form panels, and --

BY MR. MOTLEY:

Q. I'm talking about outside your company, when you had these consumers.

A. Outside?

Q. Yes, sir.

A. It's probably the product development area.

Q. Okay.

A. But I think the only name I can give you confidently is the head of the department and that would be Tilford Riehl.

Q. I'm sorry?

A. Tilford Riehl.

Q. Okay. Do you know whether your company

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has ever performed any kind of pharmacological tests on children to determine their sensitivity to cigarettes, children being defined as a person who is under the age of 18, as you define it in your taxonomy?

A. I don't think so, but let me be sure. What's a pharmacological test?

Q. Well, a test to determine if the smoking of a cigarette causes any reaction, biochemical reaction, in the person who smokes a cigarette?

A. Nothing you said triggers any recollection. I am not aware of anything like that.

Q. Have you read a report in the Federal Register of an alleged experiment run by Phillip Morris on third grade hyperactive children in the Richmond, Virginia area?

A. Not the Federal Register. I read briefly a newspaper article about it. I don't remember any more detail other than it was -- someone claimed to have found a paper that said this may have happened and that's the extent of my knowledge.

Q. To your knowledge, has your company --

A. Excuse me.

Q. -- and I realize I'm plumbing into the depths of something that's based on what you read in

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the newspaper, but having read that in the newspaper, do you know whether your company has ever conducted tests on children such as you read about in the third -- in the newspaper allegedly conducted by Phillip Morris?

A. I have never encountered any such tests. I have never heard or seen any information which would suggest to me even that it might have been done.

Q. By your company?

A. By Brown & Williamson Tobacco Corporation.

Q. Let me ask you something, sir. You are a married man. At least you wear a ring.

A. Yes.

Q. You have children?

A. I do.

Q. Do you smoke?

A. I smoke cigars and pipes.

Q. Have you ever smoked cigarettes?

A. You know, I never -- never really got into cigarettes. I prefer cigars and pipes.

Q. Just as a -- how old are your children, sir?

A. I have one who is a girl 15 and a boy 17.

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Q. Do you -- do you know whether or not your company, B&W -- first of all, let me ask you this question: Do you have a product tampering or consumer satisfaction division in Brown & Williamson?

MR. BERNICK: Product tampering or consumer satisfaction?

THE WITNESS: There is a function. I'm not sure you would say it's a division. It's a little -- it's a little broader than your suggestion. It really doesn't -- well, I guess it would. The setup is that there are some identified people within R&D who are on call when the company gets a comment about its cigarettes, even a question of why does it taste so good, is it because of so-and-so, or why does it taste bad, or there is a complaint the filter drops off, any -- any within the possible range of specific questions about the product.

There are people on call within R&D who are available to address those kinds of questions. I don't think it's a division.

Q. Okay. Do you know how long there have been such people available within the company to test consumer complaints and things that you just described?

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A. Well, they have been available since we had scientists. Those kinds of questions have always, at least in my tenure, been referred to our scientists. I think the actual identification is really more of a staffing, administrative staffing, matter. That's -- to answer your question, that's probably within the last ten years.

Q. Has it -- has there ever been a requirement of employment or a condition of employment that certain people have to smoke cigarettes about which there are consumer complaints? In other words, they are required to do that as part of their job?

A. To my knowledge, we have never had a complaint that someone was required to smoke.

MR. MOTLEY: Mark this as the next one, sir. I've got one for you and one for you. The folks down, I'm sorry.

(PLF. EXH. 14, Document titled Exit Interview dated 12/30/91, was marked for identification.)

THE COURT REPORTER: Plaintiff's 14.

THE WITNESS: Are you ready?

BY MR. MOTLEY:

Q. Oh, I'm sorry. I didn't know you weren't

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still reading?

A. Yes.

Q. Before I ask you about exhibit 14, sir , do you know --

MR. BERNICK: Actually, I'm sorry. I'm assuming from your question, Ron, that these two things are actually stapled together or part of one document?

MR. MOTLEY: Yes.

MR. BERNICK: I would assume that it's -- this one is on top, because it's a cover memo, and maybe you ought to mark this first page and then we can just staple it together or something so they don't become disconnected.

MR. MOTLEY: Sure, glad to do that. We'll have that.

MS. McGREGOR: I have a paper clip.

MR. MOTLEY: She's got a paper clip.

BY MR. MOTLEY:

Q. Mr. Wells, are you familiar with something called extended use testing which measures changes in consumers' reactions to unidentified products over time?

A. As you state it, it doesn't ring a bell. It sounds -- I would certainly want to know about

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consumers' thoughts about our product over time, but the description doesn't quite match.

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Q. Let's turn back to 14, if we might.

MR. BERNICK: I'm sorry?

MR. MOTLEY: 14, the two I just introduced.

MR. BERNICK: Right. You know --

MR. MOTLEY: This is not obviously from the Merrell Williams --

MR. BERNICK: Here is my concern, Ron. I

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don't know the answer to it, but I am concerned. And that is that this pertains to a personnel matter for somebody who appears to have been a former Brown & Williamson employee.

MR. MOTLEY: What we can do if you wish is whiteout the name on the court's copy if you would like to do that.

MR. BERNICK: That might be a good idea.

MR. MOTLEY: Okay. But let me ask --

MR. BERNICK: Just so we are clear, the concern is a privacy issue.

MR. MOTLEY: Sure.

BY MR. MOTLEY:

Q. Without revealing on the record the person's name, if you'll just look at it, and I won't state the name, because I think counsel is correct, that we should do that out of respect for her rights of privacy, do you know the lady's whose name is-- and I know you've got thousands of people working at Brown & Williamson, so I'm just asking if you had heard of her, know anything about this particular incident?

A. I don't know her.

Q. And would you agree with me, whether it's true or not, that on the comments by the interviewer,

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whose name is revealed, and I won't reveal that, either, it says that this person can no longer smoke as a result of some medical problems she has and smoking is required in her new position -- in her position -- not new position, in her position.

A. Yes.

Q. And I asked you earlier if you knew whether there were employees for whom there was a requirement or condition of employment that they smoke, and your answer was you didn't know of any.

Does this refresh your memory that perhaps there are such people?

A. No. This does not reflect a condition of employment.

Q. Okay. Coumarin?

A. Is that a question?

Q. Are you familiar with the word coumarin?

A. I'm sorry.

Q. That's all right.

A. I am familiar with the term coumarin.

Q. Do you know, sir, whether or not shipments of coumarin were delivered at any time to Reidsville, North Carolina after dark under conditions of security to be incorporated in any cigarettes manufactured at your facility there?

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A. Reidsville, North Carolina has been our facility only for a little more than a year. To my knowledge, not in the last year. I have no knowledge prior to that.

Q. Do you have another facility in North Carolina, or did you?

A. Not that I am aware of. Not Brown & Williamson Tobacco Corporation.

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Q. The person who uses that word commonly -- not that it's commonly used, but when it is used, the person who has looked at something and said, well, this may be harmful to the interest of the person about whom the document is addressed, correct?

MR. BERNICK: Well, I think the witness talked about a situation where it is alleged to be harmful. It might be used by somebody to allege.

MR. MOTLEY: I made a freshman law student mistake. I'm satisfied with his answer, and I withdraw the question.

BY MR. MOTLEY:

Q. Sir, you remember I asked you a moment ago if you understood that smoking causes lung cancer, and you said you understood that?

A. Yes.

Q. Why did your company under your signature under oath in the Butler case tell us that you didn't understand what causes lung cancer in man?

MR. BERNICK: Do you want to show him the document?

MR. MOTLEY: Sure. I think it's exhibit

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2. We've got another -- we'll make sure -- we'll make sure it's comprehensive and specific to Butler.

MR. BERNICK: Yeah. Incidentally, your question referred -- made a statement at the outset regarding the witness' prior testimony in this matter, and I think that that prior testimony related to the warning language on the cigarette package, and then you have linked that up to this document.

I don't know that that has any particular foundation. I object on the foundation form grounds.

MR. MOTLEY: That's a common sensical matter that I'm sure the jury will address, sir.

MR. BERNICK: Absolutely. What page are you on?

MR. MOTLEY: Make sure you have this one.

MR. BERNICK: Okay.

MR. MOTLEY: If not -- I think what happened is there was some commingling of another case.

MR. BERNICK: That's a different one.

MR. MOTLEY: Yeah. We will make this one 15 then.

MR. BERNICK: Do you want to mark it?

MR. MOTLEY: Yeah.

MR. BERNICK: But while you are at it --

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I'm sorry. But while you are at it, why don't you, if you could, mark this one with 14 on the front page so we'll just know.

(PLF. EXH. 15, Defendant Brown & Williamson Tobacco Corporation's Responses to Plaintiffs' First Requests For Admission, Interrogatories, and Requests for Production of Documents in the matter of: Burl Butler and Dean Butler v. R. J. Reynolds Tobacco Co., et al., was marked for identification.)

(Off-the-record conference.)

BY MR. MOTLEY:

Q. Page 4 and page 5.

Now, you signed these Interrogatories, sir, and you say Brown & Williamson -- this is what you filed:

Brown & Williamson objects to request No. 2 on the grounds that the terms "causes" and "lung cancer" are vague, ambiguous and are nowhere defined by the Plaintiffs.

Do you agree that that's what is stated there?

MR. BERNICK: Hang on. You didn't read it completely, really.

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MR. MOTLEY: I can read the whole thing in if you want to.

MR. BERNICK: Well, it says right there in the document that, subject to that objection, Brown & Williamson then goes on to state, and it goes on to state the causes of lung cancer -- regarding the causes of lung cancer as those words are commonly understood.

MR. MOTLEY: Have not been scientifically established.

MR. BERNICK: Absolutely, that's what it says. So I don't know what your point --

BY MR. MOTLEY:

Q. Do you agree that's what it says, Mr. Wells?

A. That's what it says, and this is an environmental tobacco smoke case.

Q. That wasn't the question that was requested to be answered.

A. I'm sorry?

Q. We asked you, does cigarette smoke cause lung cancer in some human beings, and your answer was, Brown & Williamson objects because the terms "causes" and "lung cancer" are vague, ambiguous and are nowhere defined by the plaintiffs, and you go on

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and say, and subject to the objection, you deny, that as commonly understood, that the causes lung cancer have not been scientifically established.

That is not an ETS question, is it?

A. Mr. Motley, we argue as lawyers as an academic matter in law school, how far can you really get away from the facts of the case you are litigating, and every time you get very far away from the facts of the case you are litigating, it just doesn't work out very well. So I don't think that an answer in interrogatory can be separated from the facts of the case that's being litigated.

Q. Well, you know, that's why Judge Landrum has a black robe, and you and I are dressed in suits.

The next question you were asked was about secondhand smoke --

A. Yeah.

Q. Specific? The first one was generic, okay?

A. Yeah.

Q. All right, let's go through some more of these, sir.

Let me ask you this: Have you ever seen a document, a Brown & Williamson document, in which it's stated that the purpose -- excuse me, the policy

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of Brown & Williamson in discovery matters is to be as evasive as possible?

A. The policy of Brown & Williamson in discovery matters is to be as evasive as possible?

Q. Correct?

A. I'm not familiar with that wording.

Q. Okay. Now, you told me yesterday that you were familiar with the special projects, and you defined it for me as you understood it, of the Council For Tobacco Research, correct?

A. I'm familiar in a topical way with the existence of CTR special projects, and the -- I have an understanding about how it operated within CTR, which is as I explained yesterday.

Q. Okay. Now, sir, if you would kindly look at page 26 of exhibit 15. In the Butler case in 1994, you responded to a request that you turn over documents relating to the special projects of the Council For Tobacco Research or Tobacco Industry Research Committee. And we specifically included reference to 1500 documents referenced in Judge Sarokin's order which we referred to yesterday.

Your response was that you objected on the grounds that No. 1 is overly broad and unduly burdensome, among other things, did you not?

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A. I don't mean to be evasive; I just haven't found the response that you are talking about.

Q. It's right under page 26, response number 1.

A. Oh, I see. I was reading the request.

Q. Response number one, the first sentence reads: Brown & Williamson objects to Request No. 1 on the grounds that Request No. 1 is overly broad and unduly burdensome.

I want to ask you some questions about that based on your testimony yesterday.

A. Yes.

MR. BERNICK: Let me ask a question. Are we hear on a discovery matter? If you've got a problem with the response, I'm assuming that you have every right and every opportunity to take it up with the Court. I can't understand why we are sitting here in day two of this man's deposition going over discovery requests in this pending case.

MR. MOTLEY: Because he signed them, sir, and we have testimony about how you have these documents coded, and I'm entitled to go into this stuff.

MR. BERNICK: You can go into the coding

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and all the rest of that. If you want to make an application to the Court --

MR. MOTLEY: Sir, we will.

MR. BERNICK: I'm sorry, but if you believe that this is a problem, and you've got a -- and you want further relief, why don't you write us a letter and take it up in the ordinary course instead of taking our time at a deposition of a lawyer.

MR. MOTLEY: Sir, I -- with all due respect to your feelings about what I'm doing, I have a purpose.

MR. BERNICK: It's not a question of feelings; it's a question of what's appropriate.

MR. MOTLEY: Well, let's press on here if you don't mind.

MR. BERNICK: Okay.

BY MR. MOTLEY:

Q. Yesterday you told us, sir, that you had a computer litigation retrieval system, or whatever your words were -- and you go ahead and define what we are talking about so we don't get in semantic quibbling here, okay?

Describe for me what was generated out of the King & Spalding project where all the documents were gathered together, a taxonomy was created, and

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you gave it a word yesterday, and I would like for you to repeat it for me if you recall.

MR. BERNICK: Wait, wait, wait. Now we referred to it in two different things.

MR. MOTLEY: Well, you tell me what it is.

MR. BERNICK: Let me try to facilitate this a little bit.

MR. MOTLEY: Good.

MR. BERNICK: Are you asking whether as a result of that project there is a computer data base that can be used for retrieval?

MR. MOTLEY: That's exactly what I'm asking. That's what he said yesterday.

MR. BERNICK: Answer.

THE WITNESS: Yes.

BY MR. MOTLEY:

Q. Okay. Now, is it not true, sir, that you have a button you can push, or King & Spalding has a button they can push, which says CTR special projects documents which are specifically coded? And I believe the code is GEA, but I'm not positive of that. Correct?

A. I don't know.

Q. Well, why is it overly broad if you've

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got one button you can push, and it will generate a list of documents that are responsive to what we asked for?

A. The defendants who were in the Cipollone case presumably would have that collection of documents already segregated.

Q. Read the next sentence of the request, sir?

MR. BERNICK: I'm sorry, Ron.

MR. MOTLEY: He just needs to read the next sentence, and it will clarify it because he is obviously confused about what we asked for.

THE WITNESS: Well, I may be. What's the next sentence?

BY MR. MOTLEY:

Q. The next sentence --

A. I'm going to start over.

Q. Yes, sir. Let's start over. Request No. 1:

Any and all documents relating in any way to the "special projects" of the Council for Tobacco Research or C -- excuse me, TIRC. This request specifically includes, but is not limited to.

MR. BERNICK: So -- and your question is why --

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BY MR. MOTLEY:

Q. Why didn't you mash the special projects code button and cough out a list of the documents that you sent to King & Spalding and they took the time to read and code and put in your retrieval system? That's my question.

A. All right. We thought it was burdensome because the request asked for a set of documents which is -- includes some number of documents which we don't believe we have. They were documents submitted by our competitors in a case where we were not involved, the references to a specific set of those documents that Judge Sarokin had in front of him, and to go searching for everything in that set of documents when we don't think we have that set of documents, and also any and all documents relating in any way to the special projects of the Council For Tobacco Research or the Tobacco Industry Research Committee is a broad set of documents.

And because this Burl Butler case involves a barber who contends that he was exposed to the tobacco smoke in the room of his barber shop when cigarettes were smoked by his customers, it seems that as compared to this case, that request is just too broad.

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In addition to that, the understanding of the counsel that was relayed to me is that the plaintiffs essentially just wanted to make sure they got that set of documents that Judge Sarokin had. And my understanding is they did. They got it from the companies who were defendants in that case. We have clearly --

Q. Is that the basis for your answer?

MR. BERNICK: I'm sorry?

THE WITNESS: Excuse me.

BY MR. MOTLEY:

Q. Is that the basis --

MR. BERNICK: No. No. No.

THE WITNESS: We clearly expressed, Mr. Motley, in this answer what we were doing.

BY MR. MOTLEY:

Q. Okay. Can you tell me --

A. And it is then up to the plaintiffs to make their response to the Court or to us if they are unhappy with it. In fact, your first obligation is to tell us if it's not adequate and we can respond to that.

Q. Sir --

MR. BERNICK: Mr. Motley --

MR. MOTLEY: What?

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MR. BERNICK: -- in the last five minutes, you have cut the witness off twice. I don't think that has happened really before in the deposition. Let's just let the witness answer the question.

MR. MOTLEY: If it's not going to be a responsive answer, if I'm going to get drumbeating speeches out of him, then I'm going to cut him off.

MR. BERNICK: No, no, no.

MR. MOTLEY: And we'll go to the judge about it.

MR. BERNICK: No, no, no.

MR. MOTLEY: Do you want to stop now and call the judge? He is at home. We will call him. He is available to hear any requests.

MR. BERNICK: Mr. Motley, don't make threats to me.

MR. MOTLEY: I'm not making any threats.

MR. BERNICK: I'm making a suggestion to you about what I believe is the appropriate procedure in accordance with the rules. If you think that his answer is not responsive, you just move to strike it and repose it again.

MR. MOTLEY: Why don't we start over.

BY MR. MOTLEY:

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Q. Are you telling this judge, to whom we will make an application, sir, that you relied on some extraneous unsworn statement from somebody unidentified on this record to the effect that all Ron Motley wanted, despite the fact he said he was not limiting what he wanted to 1500 documents before Judge Sarokin, was that is all I wanted; and secondly, that the codefendants have given me those documents? Is that a basis for your statement under oath that this request is burdensome and overbroad? Yes or no. That's a very simple question.

MR. NORTHRIP: Excuse me, Counsel. Are you representing that the party who signed an interrogatory answer is also signing the objection?

MR. MOTLEY: I'm not referencing anything. I'm asking this gentleman a question.

MR. NORTHRIP: You're saying he signed this --

MR. MOTLEY: Do you represent Brown & Williamson in this matter, sir?

MR. NORTHRIP: No, but I'm here, and I've been through a deposition that seems to have very little to do with Butler. And I'm trying to see if we can't move it along and not have questions that appear to me to be misleading.

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MR. MOTLEY: Your assistance is greatly appreciated.

MR. BERNICK: Ron --

MR. MOTLEY: Yes.

MR. BERNICK: -- let's just use this to take a short break.

MR. MOTLEY: Sure. No problem.

THE VIDEOGRAPHER: We will go off the record at 10:38 AM.

(A recess transpired.)

THE VIDEOGRAPHER: We're back on the record at 11 -- I mean 10:55 AM.

MR. BERNICK: It was pointed out to me in the break in particular with regard to a Plaintiff's Exhibit 15 that we have again a situation where questions are being asked, and I think that they are not a correct -- they assume an incorrect representation of the record.

I'm looking at page 32, and page 32 of Plaintiff's Exhibit 15 reflects that counsel, outside counsel, for Brown & Williamson signs as to the objections only.

MR. MOTLEY: Which outside counsel?

MR. BERNICK: Well, in this case, it's Mr. Hewes.

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MR. MOTLEY: Notice up Mr. Hewes.

MR. BERNICK: And the verification of Mr. Wells is a verification as to the responses. So if -- when your questions sought to elicit from this witness testimony concerning the objections, essentially what you're doing is taking up our deposition time interrogating an in-house lawyer acting essentially in the capacity as somebody who would argue the merit of the objections, not as somebody who has verified the responses.

And again, I think that that is misleading. I object to it and move to strike all that testimony and all the questions.

MR. MOTLEY: Sure. The jury is going to love that one, my friend.

BY MR. MOTLEY:

Q. Let's turn to page 27, sir, please, and look at the top of that page.

MR. BERNICK: Mr. Motley, I see here that you've got some post-its. I don't want to read your post-its.

MR. MOTLEY: If you can, you may.

MR. BERNICK: I kind of thought you might say that, but I didn't want you to be in ignorance of where they were.

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MR. MOTLEY: Thank you, sir. It's in the spirit of sharing that I give you these.

MR. BERNICK: I see.

BY MR. MOTLEY:

Q. I will read the sentence --

MR. BERNICK: If that's all we're going to share in this litigation, it's going to be a long road.

BY MR. MOTLEY:

Q. -- Brown & Williamson objects to Request No. 1, the same one we are talking about, on the ground that it seeks publications resulting from research funded by CTR or TIRC which are readily available through publicly available sources.

Is it your testimony, sir, that the research that was funded by special projects is published somewhere; and if so, would you direct me to where I can find it?

A. Mr. Motley, I would first like to just take a minute, if I may, to read the context of that sentence --

Q. Sure. Absolutely.

A. -- in the document.

I'm sorry, now your question again?

Q. Yes, sir. Based on the sentence I read

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you in regard to publications which are readily available through publicly available sources, can -- is it -- is it your company's position that the special projects research, scientific research, are publicly available; and if so, can you direct me to where I can find it?

MR. BIERSTEKER: Object to the form.

THE WITNESS: Yes. Let me cover that. It really starts with the construct of this response. And I may have misread it a minute ago.

This response sets out a number of different objections, none of which is intended to be a total objection to the request. All added together, of course, I think they -- they constitute an objection to the full scope of the request.

But it's not clear that any of them alone would. For instance, overly broad and unduly burdensome might not completely object to producing whatever few documents we have that Judge Sarokin had.

But unduly burdensome in terms of the scope of all the documents related to the Council For Tobacco Research or the TIRC, our collection, for example, the data base you mentioned, only goes up to 1986. So that would require the collection of a

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large number of documents post 1986 coming forward.

And, of course, just because you have a computer and you can punch in some numbers, all you get out is other numbers. Then you have to go out and gather all those documents, make copies, and your lawyers have to review them. That's very burdensome.

Now, as to this specific point, the -- there are two -- let's see. This sentence, as I understand it, asks only about CTR or TIRC. The research done -- funded by grants from CTR is stated to the researcher to be for the purpose of the conduct of research by that independent scientist, and it is specifically left to the discretion of the independent scientist whether to publish that research or what the scientist does with it.

It is not -- well, the hope of the grant is that it will result in published research.

Q. Are all the special project research granters given the luxury of deciding for themselves without lawyer involvement whether they publish their research or not?

A. Let me come back to special projects just a second. I thought that was part of your question, yet it doesn't seem to be part of this particular

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objection, but I will address it.

As to special projects, I'm not intimately familiar with them. My understanding is that many of the special project research items were published in the literature, but in any event, special projects research was not done for the purpose necessarily of publication.

It was a litigation purpose. It was -- it was not directed by the scientific advisory board of CTR. It was directed by the litigation law firms, and it was done for litigation purposes.

Q. So I take it the answer to my question is that all the special projects research papers are not published and publicly available, correct?

A. I don't know. A number of them are, but I don't -- I don't know -- I haven't seen an accounting of its full range.

Q. Who might know in the corporation, Mr. Pepples, perhaps, which of the special projects research papers were published and which weren't?

A. Mr. Motley, I don't know that any individual is going to have that full information in his head. That's going to require some research.

Q. Well, let me ask you to --

A. Somebody is going to have to get out

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lists and compare them.

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MR. BERNICK: I'm trying to get you an answer to your question, Mr. Motley.

MR. MOTLEY: Okay.

MR. BERNICK: And I think what your question is is that in response to or in anticipation of a production in response to request 1, did they go ahead and prepare a privilege log which would cover CTR special project documents.

MR. MOTLEY: Right.

MR. BERNICK: Did that get done?

THE WITNESS: There are some elements to that question. Let me address them hopefully all. And if I don't address them all, help me if I have

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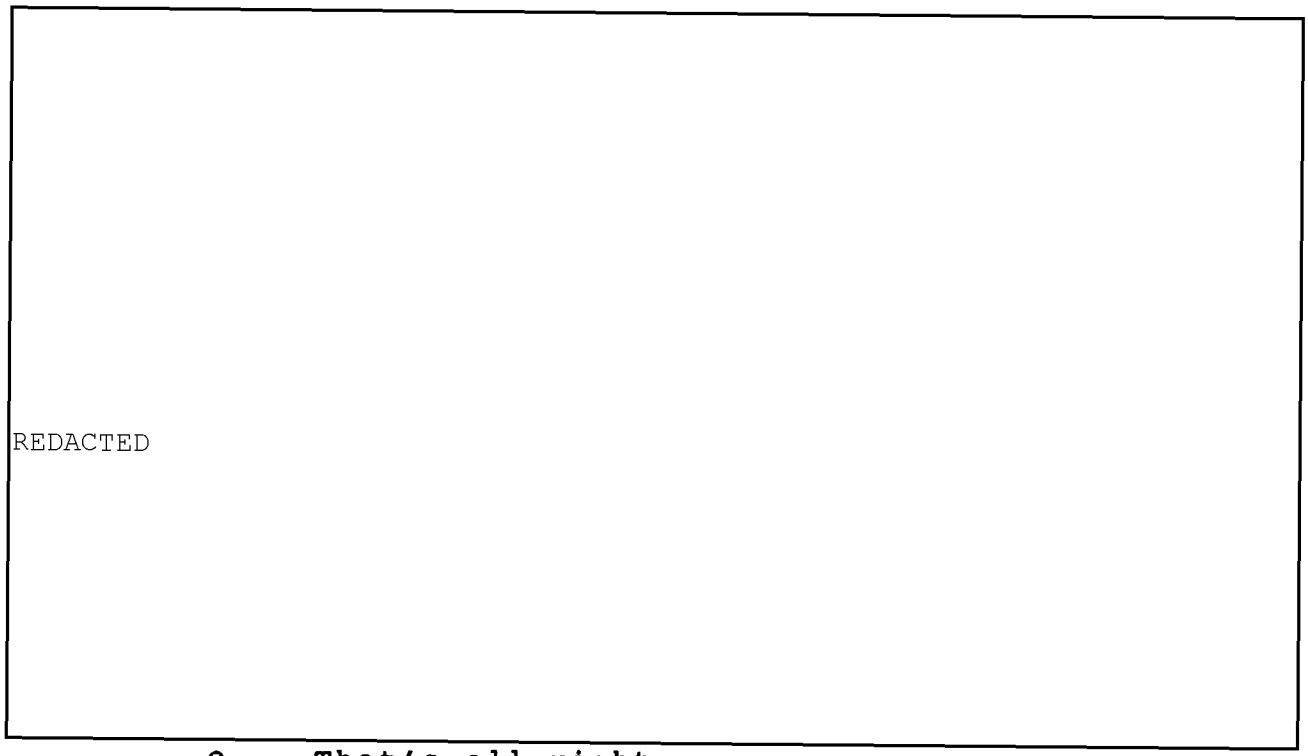
BY MR. MOTLEY:

Q. Well --

A. In fact --



Q. That's all right.

A. The answer is, I don't know. I do know that this is a pleading that was filed in the original action, which was in the District of Mississippi, Jackson Division. That was -- that action was dismissed, and my recollection is that there was no follow-up to these objections because the action got dismissed. And this is -- the action was started again as a wrongful death action in Laurel, so this is not applicable to the present action in Laurel.

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Q. All discovery, sir, was transferred, will you assume that, in this proceeding?

A. No, I don't. I don't know that. It was a new action. This was not a wrongful death action. Mr. Butler was alive at the time.

Q. Correct. Do you know anything about the law in Mississippi, something called a survival action, sir?

A. Very little.

MR. BERNICK: Mr. Motley --

MR. MOTLEY: I thought so.

MR. BERNICK: -- all he is saying is that -- he is just telling you what he thinks the history of the case was, you know.

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A. No. My assumption is that, as lawyers will, they have probably updated it since 1988, but I don't know.

MR. MOTLEY: Off the record.

(Off-the-record conference.)

MR. MOTLEY: Back on the record.

THE COURT REPORTER: We didn't go off the video.

MR. MOTLEY: That's okay. Everybody knows joking. Off the record.

(Off-the-record conference.)

BY MR. MOTLEY:

Q. Sir, to the extent, as you testified previously, some special project funded research was published, to the extent it was published, can you tell me whether in the publication they acknowledge funding from CTR special projects or Special Account Number 4 in the body of the published paper?

MR. BERNICK: Those are two different questions, but in any event, I'll object on the grounds of lack of foundation unless you can

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be somewhat -- not as familiar with Mr. Hewes, of course, but since I try a lot of cases in Mississippi, I'm familiar with the law of punitive damages.

MR. BERNICK: I'm sorry, Mr. Motley. I just don't know which --

MR. MOTLEY: 7. 7 is financial statements or annual reports. I'm entitled to put into evidence for the jury's consideration the wealth of the Defendant.

MR. BERNICK: Okay, we have that as request 9.

MR. MOTLEY: Okay. That's fine. I would just ask you to consider when we call you next week letting me know whether you'll voluntarily provide that because, Mr. Hewes will tell you this, that is not only discoverable, but admissible on the punitive damage claim to the extent the Court allows us to continue with one.

MR. BERNICK: You used up your third one, you know.

MR. MOTLEY: Well, that's an important one.

THE WITNESS: Do you know whether you have made that claim -- that request to us in the

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Laurel action?

MR. MOTLEY: Well, I don't know, sir, but, you know, it won't be hard to do. Okay. I think if you check with Mr. Hewes that we agreed to transfer the discovery from the federal case to the state case at the request of your counsel so we wouldn't have to redo all this.

THE WITNESS: Unless Mr. Hewes stands up and yells, I will take your word for it.

MR. MOTLEY: Let the record reflect that he has remained seated.

MR. BERNICK: Quiescent and seated, yes.

MR. MOTLEY: As the gentleman he is calls for.

BY MR. MOTLEY:

Q. Okay, let's go onto something else.

MR. BERNICK: Do you have a rubber band here? I'll watch every step you take.

THE WITNESS: Let me also say thank you for pointing that out.

BY MR. MOTLEY:

Q. Exhibit number 13 --

A. Did you hear me?

Q. No, sir, I'm sorry.

A. I just said thank you for pointing that

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out.

Q. Yes, sir. Well, I thought that was the case, but then I know you have a lot of cases you have to work on, and I do, too. I wasn't quite sure, but Ms. Flowers advised me, and I believe that that was an accommodation that counsel reached so we wouldn't have to fell a few more trees in the forest.

Exhibit 13, would you kindly look at that.

MR. BERNICK: Exhibit 13.

MR. MOTLEY: Do you have a copy of that over there, or do you want me to throw you one?

BY MR. MOTLEY:

Q. Do you have that in front of you?

MR. BERNICK: Hang on for a second.

BY MR. MOTLEY:

Q. Now, I don't remember whether I asked you if you had seen that before. I probably did ask you that, but if you would for the record foundationally, answer the question: Do you recall ever receiving or seeing that document other than in your review of the Merrell Williams documents? In other words, at the time -- at or about the time it was generated, do you recall whether you saw a copy of this?

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A. I don't recall.

Q. Okay. Now, you see in the top right-hand corner there is some handwriting?

A. Yes.

Q. It says law reports to chairman?

A. Yes.

Q. Can you tell me whose handwriting that is?

A. I cannot.

Q. Are there regular reports given by the law department to the chairman, I assume, of the corporation?

A. I don't --

MR. BERNICK: Hang on. Any particular period of time frame?

MR. MOTLEY: From 1972 to right now.

MR. BERNICK: That was helpful.

THE WITNESS: I know there have been reports. The kind of reports that seem to be the subject of your question would be issued by the general counsel and that would still be the practice, but I'm not able to answer your question. I just don't know.

BY MR. MOTLEY:

Q. Well, is there a regular reporting -- and

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I don't want at this time to get into what's said or anything that would impinge upon attorney-client privilege, but just for informational purposes -- is there a policy of regular reportage between the general counsel to the chairman like every three months, once a year on the status of smoking and health litigation?

A. I don't know about the regular reports, but I don't want to mislead you. Our general counsel probably sees the CEO every day they are both in town, and I'm sure that if you take orally at those meetings and in writing together, there is quite frequent reports.

Whether there is a -- a regular at set interval formal report to the CEO, I don't know.

MR. BERNICK: Are you talking about a practice today? Are you talking about how it is today?

THE WITNESS: The practice that I have just identified to my knowledge covers the years you have mentioned. That's been the case throughout my career.

BY MR. MOTLEY:

Q. Okay. The same question, but specific to special projects research. Do you know whether the

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general counsel or anyone in that office regularly in writing makes reports to the chairman of the status of the special projects research?

A. I do not.

MR. BERNICK: Hang on. Let the record reflect I didn't have the opportunity to object to the question. I consider it an inappropriate instruction. In light of the witness' answer, I don't know that it really makes a difference.

BY MR. MOTLEY:

Q. Can you tell me, sir, whether Brown & Williamson prior to 1990 ever provided copies of research projects entitled Hippo, H-I-P-P-O, 1, 2 and 3, Rio, R-I-O, or Janus, J-A-N-U-S, to any U. S. Government agency?

A. I'm sorry, your date was?

Q. Prior to 1990.

A. I don't know.

Q. Can you tell me, sir, whether within the collection of documents that constitute 500 to 800 pages in number, what you referred to yesterday in the Dewey production --

A. Yes.

Q. -- there exist copies of Hippo 1, 2, 3, Rio, Janus or any of them?

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A. No. Those Dewey productions were limited to marketing documents related to a specific brand for a certain period of time. It would not have included scientific dated.

Q. So is it fair to say from 1954 to 1990, copies of Hippo 1, 2 and 3, Rio, and Janus or any of those have not -- were not produced to any plaintiff's attorney in smoking and health litigation?

MR. BERNICK: The dates of that question were?

MR. MOTLEY: 1954 -- I know some of them didn't exist in 1954; I'm trying to be inclusive.

BY MR. MOTLEY:

Q. From 1954 to 1990, none of those reports were ever produced in smoking and health individual litigation in the United States?

A. I'm not informed as to whether that may have occurred prior --

Q. I'm sorry. Go ahead.

A. I'm not informed as to whether that occurred prior to my term with the law department. I can only say that I'm not aware of such production beginning the mid 1970s.

Q. Okay. And to the extent that we can rely

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on the subsequent letter to Ms. Walburn or whatever that we talked about yesterday in which the number of pages was clarified and counsel stated it was in the ballpark of what you recollected, 500 to 800 pages --

MR. BERNICK: I think that -- we had to pull the correspondence. I think it ended up being 1307 pages.

MR. MOTLEY: Okay.

BY MR. MOTLEY:

Q. Can you tell me, sir, in the 1307 pages that are referred to in the amendatory letter from Minnesota counsel to Ms. Walburn, among that collection of 1307 pages, is it not true that none of those pages include pages from Hippo 1, 2, 3, Rio or Janus?

A. That's correct.

Q. Okay.

A. I should have said 500 and 800.

Q. Yeah. Okay. That's all right. Well, I mean, really, that -- the difference between 500, 800 and 1300 doesn't amount to much at least to me.

Can you tell me, sir, whether the law department of Brown & Williamson has retained any PR firms or investigatory agencies to gather information on any lawyers representing plaintiffs in any kind of

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smoking and health cases currently pending against Brown & Williamson?

MR. BERNICK: Hang on. I don't know that there is any information that would be responsive to that question, but if there is, it would obviously be in conjunction with litigation. It would be privileged, and I will instruct him not to answer the question.

BY MR. MOTLEY:

Q. Based on your counsel's statement, sir, is it -- would it then be true that part of Brown & Williamson's strategy would be to hire detective agencies and PR firms to investigate myself?

MR. BERNICK: I just made an objection and gave an instruction. It's not the witness' testimony. It is based upon the principles of privilege, so --

MR. MOTLEY: Okay. I understand that. I'm just building a record for which I can get an answer, so I can find out who has been tailing me. That's a joke.

MR. BERNICK: Somebody has been tailing you?

MR. MOTLEY: If they have, you have been

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paying them too much.

MR. BERNICK: If you know about it.

MR. MOTLEY: If I know about it.

MR. BERNICK: They can't be that good, hey?

No, I will instruct him not to answer that question.

MR. MOTLEY: Okay. Would you get me 6-12-84, conference with BAT law? It's in the Williams collection.

Mark this as -- is this 17 then? 16?

(PLF. EXH. 17, File Note from J. K. Wells, III dated 6/12/84, was marked for identification.)

BY MR. MOTLEY:

Q. Plaintiff's Exhibit Number 17, do you have a copy of this? Do you want to look at this one?

MR. BIERSTEKER: Yes.

MR. MOTLEY: Be sure and give that one back because that's a marked one.

THE WITNESS: This came from the UCSF library?

MR. BERNICK: I guess so.

BY MR. MOTLEY:

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Q. Yes, sir. First, sir, would you look at page 3 of exhibit 16 and tell me if that's your initials.

A. That appears to be the initials, but I would like a chance to go through the document --

Q. Oh, absolutely.

A. -- before that's taken as a verification.

Q. Okay.

MR. MOTLEY: You have page three?

THE WITNESS: They seem to be out of order. We do, but page 3 is the second page.

MR. MOTLEY: Okay, it is out of order.

MR. BIERSTEKER: Counsel, the exhibit marked by the reporter has only got two pages.

MR. MOTLEY: Well, we will substitute a full copy.

MR. BERNICK: I'm going to have to break pretty close to around noon if that's not too much of an interruption for you because I've got to take a call.

MR. MOTLEY: No, that's fine, and I think we can probably find a sandwich shop in this complex here and maybe try to get back in an hour. Is that okay?

MR. BERNICK: No problem.

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MR. MOTLEY: And then maybe -- subject to nobody waiving nothing except banners of frustration -- quit about 3:00? Is that okay? Nobody is waiving anything. Does that accommodate people's schedule because I understand this weather is getting bad outside. Has anybody got a problem with that? Okay. Okay.

MR. BERNICK: Is this the only copy that was marked?

MR. MOTLEY: Yes. We will get the pages straight during lunch.

(Off-the-record conference.)

MS. McGREGOR: And here is a full copy for you.

MR. BIERSTEKER: Thank you very much.

(Off-the-record conference.)

BY MR. MOTLEY:

Q. Okay, are you ready, sir?

A. Yes.

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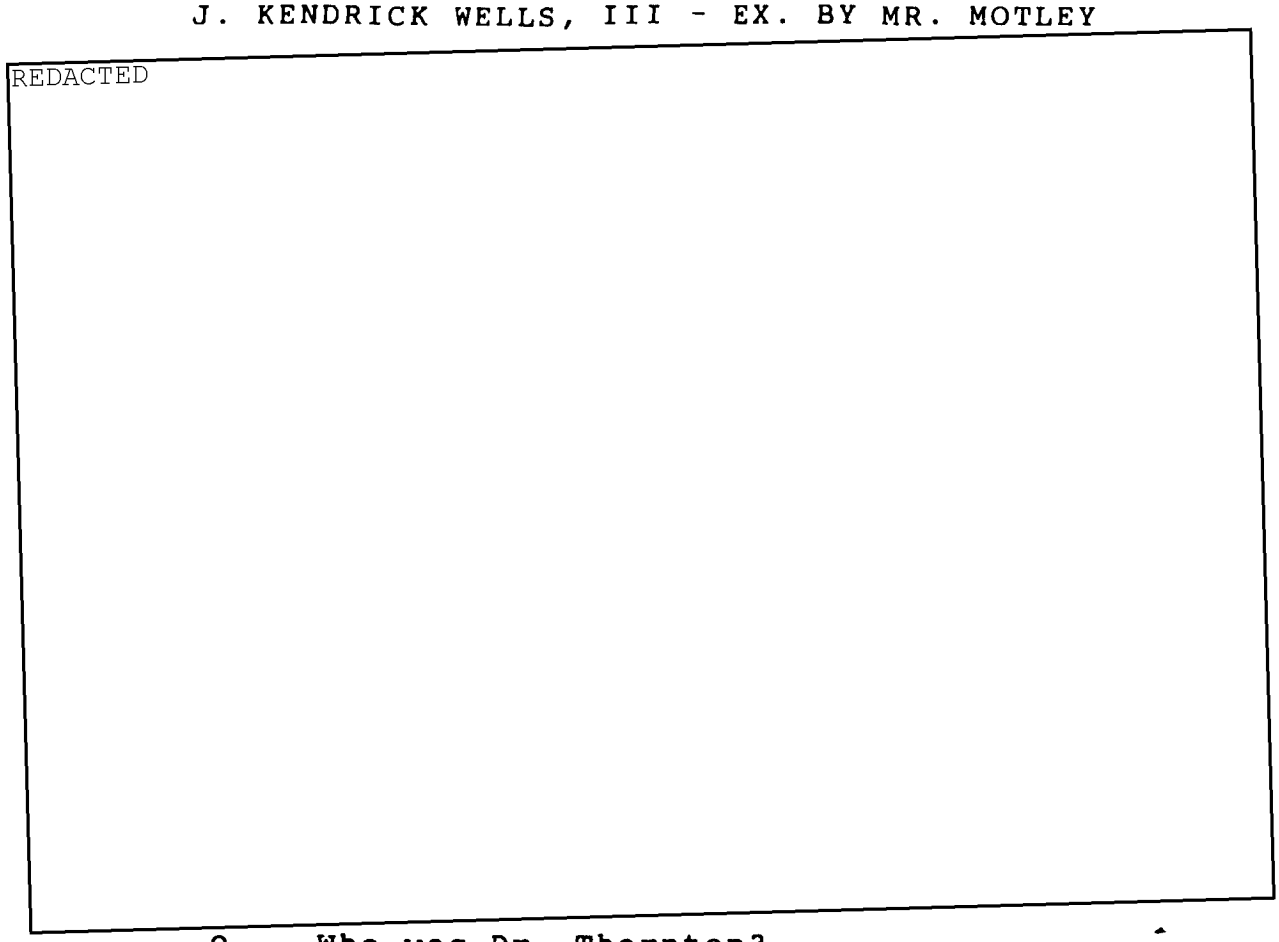

Q. Who was Dr. Thornton?

A. Dr. Thornton is Dr. Ray Thornton, who was a senior scientist with the British American Tobacco Company.

Q. Do you know what kind of a scientist he was other than a good one?

MR. BERNICK: What discipline?

MR. MOTLEY: Yes.

BY MR. MOTLEY:

Q. What discipline?

A. His assignment was to work in the area of smoking and health. I do not know beyond that what

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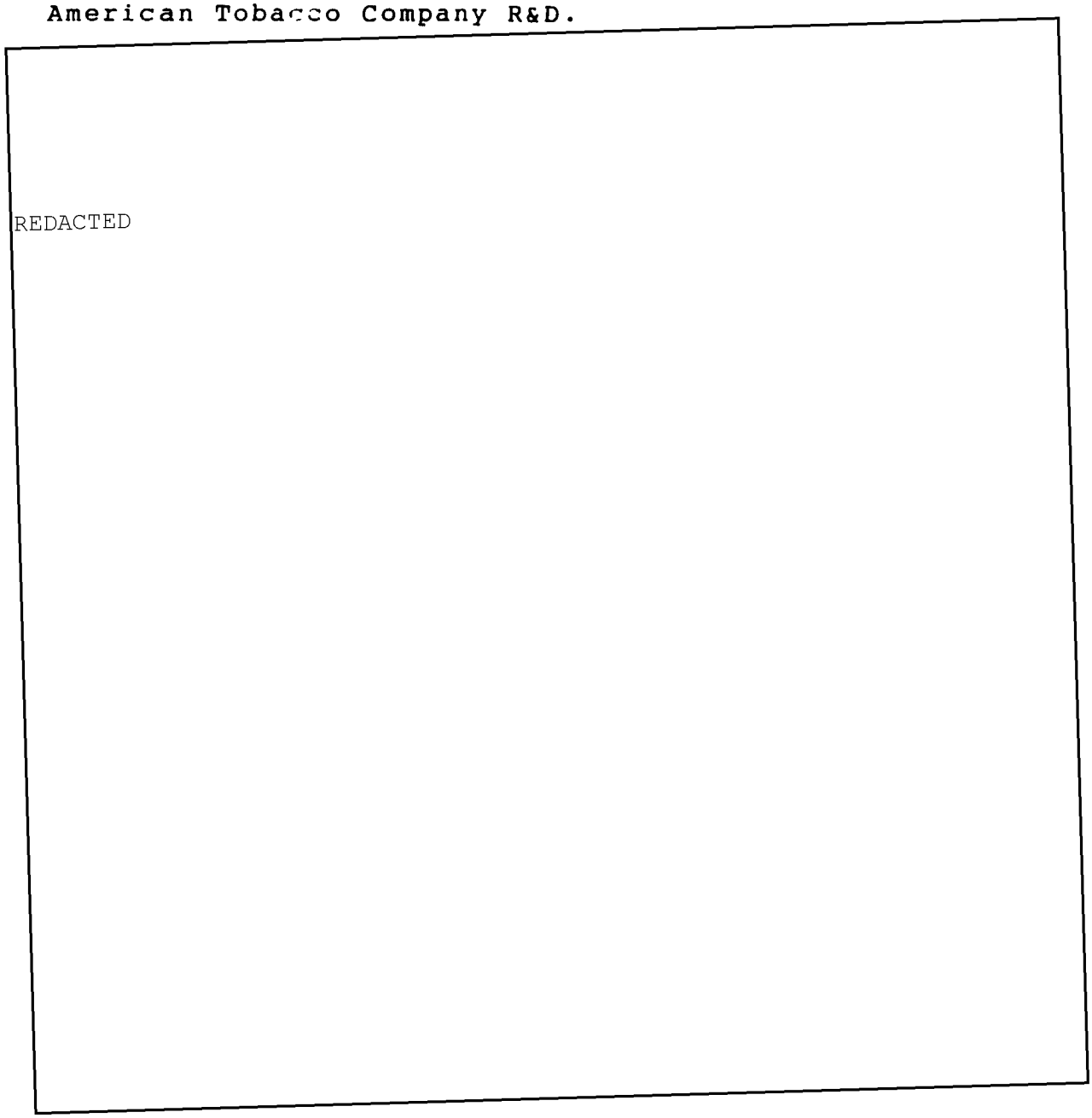
you would say his discipline was.

Q. Is this -- there is a reference in another document to Dr. Blackman?

A. Yes.

Q. Who was he?

A. Dr. Blackman was the head of the British American Tobacco Company R&D.



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MR. MOTLEY: Okay. Do you want to break now, and we will come back to this after lunch?

MR. BERNICK: Sure. About one o'clock?

THE VIDEOGRAPHER: We will go off the record at 12:01.

(The following proceedings transpired off the video record.)

MR. BERNICK: Still on the paper record. We are prepared to proceed throughout the balance of

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the day, and I understand that you expect basically to finish around 3:00 with your examination. I understand further that you are not waiving your right to take the position that the deposition should be resumed at some later date.

MR. MOTLEY: That's correct. And you mentioned earlier that you wanted then to conduct an examination of the witness. That's a rather different procedure. What I would -- if you insist on doing that, what I would say is that we do it with a separate tape and a separate transcript, because in the event that I decide to object, which I'm inclined to do now, because I don't think it would be appropriate for you to ask questions now before the Court has a chance to rule on whether some of the questions to which he was instructed not to answer survive the privilege objection.

In other words, I may have another chance to sit down with Mr. Wells, even if you win the two-day issue and ask the privileged questions.

MR. BERNICK: And you are obviously always free to do that. I'm going to be asking him questions about other matters, matters to which he did provide answers.

MR. MOTLEY: I understand. I just think

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that's not an appropriate procedure. I would ask you to reconsider that during lunch and let's find out whether we need to fight about it. I think we all know in our heart of hearts that some of the questions you have asserted privilege to, I have a devout heart that they will be stricken by the judge.

I think we will be coming back to Louisville again, and I would ask you to consider waiting until that time to ask Mr. Wells questions.

MR. BERNICK: I just don't know what the relationship is between those two things. Anyway, we're going to go ahead. I will think about it over the lunch hour, but I'm pretty confident we are going to want to go ahead and ask those questions. So I want to alert you to that.

MR. MOTLEY: I'm pretty confident I'm going to object and will probably ask for a Court ruling because it is an unusual procedure if a deposition is not concluded for the other side to insinuate their questions into the record. Let's don't argue about it now. Maybe a nice turkey sandwich will change your mind.

(A luncheon recess transpired.)

MR. BERNICK: Yesterday, there was a

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series of questions relating to a customs investigation of the company, and I have since consulted with other counsel who is more directly involved in advising the company in connection with that process; and as a result of those consultations, we are prepared to allow the witness to answer questions relating to that customs investigation to the extent of his personal knowledge. Obviously -- or personal involvement, I should say.

Obviously, many things could have come to his attention in his capacity as counsel to the company, and those matters in all likelihood would be privileged, and we're not opening the door to that.

But as I understand it from consultations with counsel, there are various facts pertaining to the progress and process of the investigation which are known personally by the witness because he was personally involved and would be properly discoverable.

So I wanted to let you know that to say that we would permit the witness to answer questions along those lines.

MR. MOTLEY: Are we ready?

(The following proceedings transpired on the video record and stenographic record.)

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THE VIDEOGRAPHER: We're back on the record at 1:10 PM.

BY MR. MOTLEY:

Q. Mr. Wells, did you consider the market for tobacco products of Brown & Williamson in the United States to -- to be driven by concerns about tar and nicotine?

A. You say did I?

Q. Did I, you. At any time, have you held that view?

A. Driven by --

Q. Concerns --

A. It depends on the context. One of comparison, the things you are talking about, tar and nicotine is something that is important to the choice made by consumers; and to that extent, you could say that it's certainly important. I'm not exactly sure what driven means.

MR. MOTLEY: Could you pull the document dated February 17th, 1986, please? And we'll mark a copy of that as 18.

(PLF. EXH. 18, Memorandum from J. K. Wells, III to E. Pepples dated 2/17/86, was marked for identification.)

BY MR. MOTLEY:

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Q. Now, in turning to Mr. Butler's case, do you know whether your counsel has participated in an effort to exploit alleged inconsistencies in Mr. Butler's life-style, particularly a claim being made that Mr. Butler was a regular smoker of cigarettes? Do you know whether your counsel has participated in that?

MR. CARTY: Objection as to form.

MR. BERNICK: Yeah. I'm not familiar with the full record obviously in the Butler case.

MR. MOTLEY: Well, let me just tell you where I'm coming from, okay?

MR. BERNICK: Yeah.

MR. MOTLEY:

Q. There is a witness that has been listed by all the Defendants who is supposedly going to testify that Mr. Butler was a regular smoker, okay? Just assume that to be true. And my question is,

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does -- do you know whether Brown & Williamson is making such a claim that Mr. Butler may instead of being a nonsmoker was a regular smoker?

MR. BERNICK: To the extent that that calls on the witness to divulge work product that is in process --

MR. MOTLEY: The witness' name has already been revealed and his statement has been revealed so... It may also be in progress.

MR. BERNICK: I don't understand your question.

MR. MOTLEY: I guess what I'm asking -- and I don't guess what I'm asking. What I'm asking is, is that a position taken by Brown & Williamson in the Butler case; that is, that Mr. Butler was a regular smoker, not a nonsmoker?

A. I have, I'm sorry, a lot of difficulty with the terms. Because you seem to be addressing on the one hand, someone who -- we are going by assumption. I do not remember -- I'm not aware of such a particular witness. Does that answer your question?

Q. Okay. Well, the reason I'm asking this is you attested to the accuracy of Interrogatories in which you made the claim that since Mr. Butler was a

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nonsmoker, questions about what happens to people who smoke was irrelevant. And I want to know, has your position as stated in your Interrogatories the position your company is taking at trial, or are you taking the position he is a regular smoker?

A. Well, I'm very reluctant to discuss position as such, which is I understand something that happens at trial when you are talking about a fact witness, which I assume such a witness would be, in a deposition. I'm really not prepared to discuss position with you.

Q. Okay. That's fine. Do you know whether BATUS or BAT engaged in detailed direction of Brown & Williamson marketing plans?

MR. BERNICK: I object to the form of the question it. Lack of foundation. I don't understand what that question means, Mr. Motley, but, if you have knowledge in that area, and you understand the question, you can go ahead and answer.

THE WITNESS: Not to my knowledge.

BY MR. MOTLEY:

Q. Did you ever express a concern in writing that they may do that?

MR. BERNICK: If -- that does call, I think, for privileged information. If you've got a

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document that's a UCSF document that deals with that and is covered by Judge Landrum's Order, I would like to see it so I can make a determination on it, otherwise I will have to instruct him not to answer the question.

BY MR. MOTLEY:

Q. Do you know, sir, whether Brown & Williamson did -- conducted any research on the development of a low side-stream or self-extinguishing cigarette?

A. We certainly conducted research on the development of a self-extinguishing cigarette, and Brown & Williamson and the British American, as well. Research on developing a low side-stream product has been done. I can't recall whether it was Brown & Williamson or our sister company.

Q. BAT?

A. Yes.

MR. BERNICK: BAT?

MR. MOTLEY: BAT.

MR. BERNICK: I don't know that BAT is the name of any particular company.

MR. MOTLEY: I just asked him when he said sister company, which sister company.

THE WITNESS: Brown & Williamson -- I'm

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sorry, it's not -- no, excuse me. British American Tobacco Company.

BY MR. MOTLEY:

Q. Okay. Do you know whether that research has been published in the scientific literature available to scientists, or what?

A. Can we talk about one of those subjects at a time?

Q. Low stream. Okay. The low side-stream research you referred to, do you know whether it has appeared in the scientific literature?

A. The research related to the aspects of designing such a product is certainly in the literature and would come from the literature. The different factors of analysis that become involved in looking at ETS, I'm not aware of the extent of whether development of a side-stream product was published, development of the product itself.

It's probably a trade secret. That is, not to say that any developments that would -- well, let me put it another way. It would be a trade secret, but it's trade secret for research which if you could get a product, you would probably market it if there was a demand for it.

So it would be out in the open. If there

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was anything worth patenting, a patent application would have been filed and hopefully issued if we had a good ground for it. That is publication.

I'm trying to sort out the idea of publication, because publication for the development of product as such is normally not done. It's normally -- I don't think it's important to the consumer as to what products you are developing.

If we talk about product development itself, there have been products marketed -- and I know of at least one product marketed and advertised suggesting that. So that's certainly out in the public.

Q. What product is that? What product is that?

A. I believe Phillip Morris advertised one.

Q. Do you remember the name of it?

A. Virginia Slims, Ultra Slims, I think. BAT may have published in some way or another product development work on a side-stream cigarette or not. I don't know.

Q. Okay. Let me ask it this way: Do you know whether any research was done by BAT or any other affiliated company of Brown & Williamson on any biological or toxicological effects occurring from

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side-stream smoke? Research, the first question. Research done on any biological effects from side-stream smoke.

A. That kind of research rings a bell, but I just can't remember who did it.

Q. Well, can you tell me whether such research, if it exists, has appeared in the peer review scientific literature? Not a patent, but peer reviewed scientific literature?

MR. BERNICK: Research of the biological activity of side-stream smoke, right?

MR. MOTLEY: Yes.

THE WITNESS: I can't recall.

BY MR. MOTLEY:

Q. Can you tell me whether that research, if it exists, would appear as a document that has been indexed into the computer bank or whatever we have been calling it, that we have discussed that you and King & Spalding and others developed, or you recommended and they developed, and they now warehouse?

A. I don't know. Let me explain that. The data base that we now have that you referenced is based primarily on documents up to about 1986. And since that time, we have been updating it, but -- and

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we have a project going now that will fully update it for documents which would certainly include scientific documents that we may have.

The certain answer I can give is that if we have such a document, it should be on the data base either now or if it's after 1986, and it probably is, just by the chronology of this issue, it will get on the data base.

Q. Have there been scientists employed as consultants by British American Tobacco who you learned, you personally learned, were of the scientific opinion that cause had been proven?

MR. BIERSTEKER: Object to the form.

MR. McLAUGHLIN: Objection to the form.

THE WITNESS: I'm sorry, I lost the frame of reference.

BY MR. MOTLEY:

Q. Have there been scientists employed by British American Tobacco as consultants whom you came to learn that the scientists so employed believed that cause was proven?

A. Thank you.

MR. BIERSTEKER: Same objection.

THE WITNESS: Yes.

BY MR. MOTLEY:

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Q. And who were they?

A. Two I remember. One is Francis Roe, R-O-E, and the other is Peter Lee.

Q. And those are both British scientists?

A. I believe so.

Q. Now, when you use the word, you Kendrick Wells use the words, cause is proven, what does that mean?

MR. CARTY: Objection.

MR. BERNICK: Wait a minute.

MR. MOTLEY: Let me rephrase it, and then I will be quiet, and let you object.

BY MR. MOTLEY:

Q. When Kendrick Wells uses the word cause is proven in connection with tobacco and health, what does Kendrick Wells mean?

MR. BERNICK: I don't -- I think that that question by itself is not an objectionable question, but the context in which it is posed is the context of the prior question where he was asked by you did you come to learn that there were consultants who believed that.

MR. MOTLEY: Right.

MR. BERNICK: And I take it that you are now going onto new subject matter, what does Kendrick

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Wells believe or understand the word cause to mean as opposed to what these other people might have felt.

MR. MOTLEY: No, sir. To be -- so we won't spend too much time on this. Mr. Wells wrote in June of 1984 those very words I just articulated, and I want to find out from him what he meant when he said cause is proven. Obviously he was referring not to himself, but back to some scientists whom he has now identified.

MR. BERNICK: I understand but that gets a little confusing. What don't you ask him what he meant by he believed that so we can --

MR. MOTLEY: Well, I want --

MR. BERNICK: He may have a different notion of cause and that's what he is referring to than his own notion of cause. And that's what the problem is. Go ahead and ask what you want, you know.

BY MR. MOTLEY:

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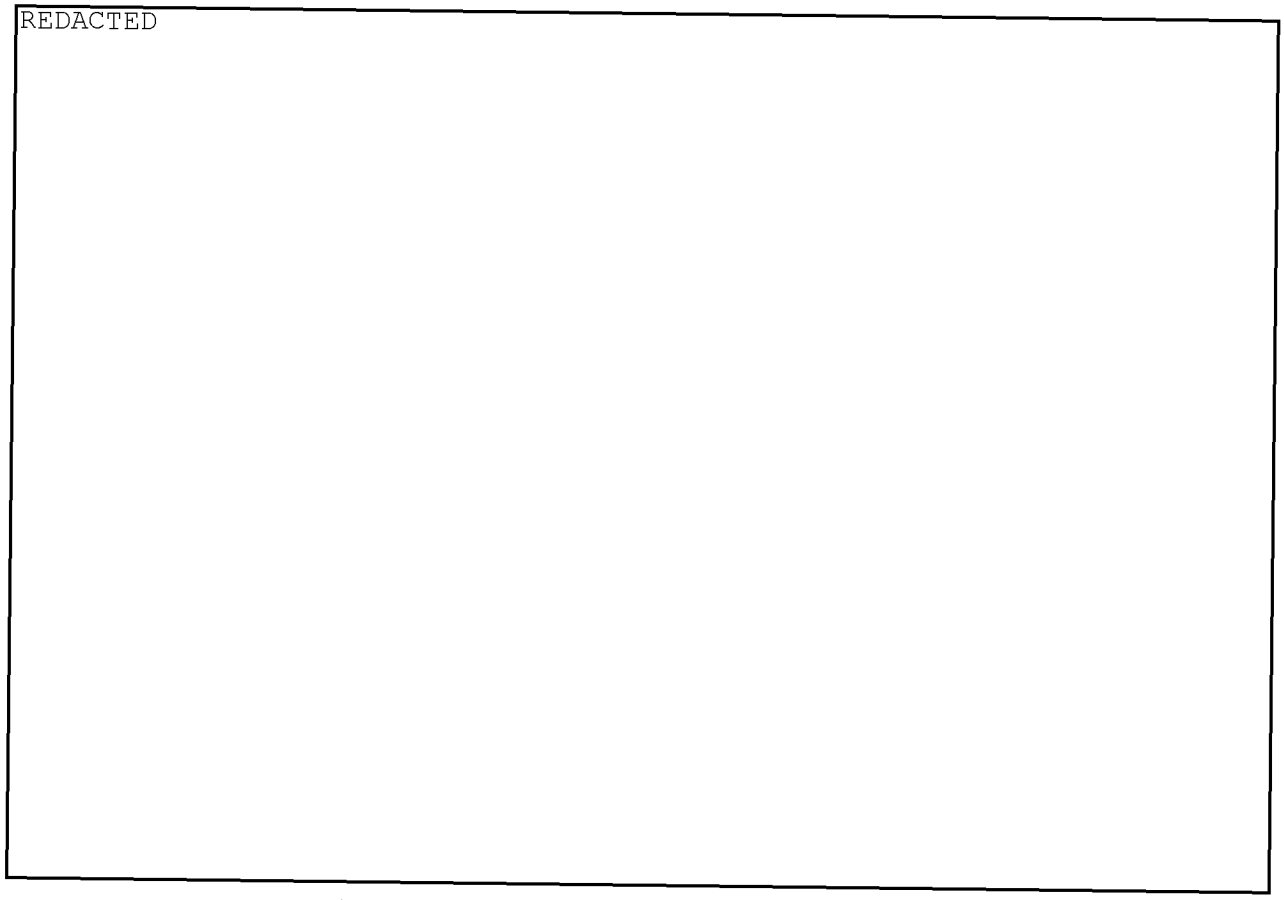

Q. Okay. Can you list for me, sir, the documents that Brown & Williamson obtained when they -- I don't want to use a word with a sinister connotation, at least not today -- when they obtained Mr. Wigand's files -- file after he was discharged from the company?

A. I'm sorry, I didn't follow that.

Q. Were any documents that Mr. Wigand, Jeffrey Wigand, maintained while he was employed by Brown & Williamson, were they retained by the company when Mr. Wigand was discharged?

MR. BERNICK: I don't think you have a

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foundation for that. To the extent that you know about that.

THE WITNESS: I don't know.

MR. BERNICK: And -- okay.

MR. MOTLEY: Okay, I'm sorry. I'm missing something here.

BY MR. MOTLEY:

Q. What did you say?

MR. BERNICK: He said he didn't know.

THE WITNESS: I don't know.

BY MR. MOTLEY:

Q. Do you know whether or not -- have you reviewed any documents that were left by Dr. Wigand when he was discharged?

MR. BERNICK: That he knew to have been left by Dr. -- he may have -- he may have seen during the course of business documents that Jeffrey Wigand either wrote or received in the ordinary course of business, and he doesn't know whether they were left after Wigand left or not. If -- you are asking did he ever review the file?

BY MR. MOTLEY:

Q. Have you reviewed any documents that bear Jeffrey Wigand's left behind file or anything like that?

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A. I have never seen Jeff Wigand's files. No one has given me or shown me a document and said this came from a Jeffrey Wigand file.

Q. You mentioned something just a moment ago, that you were in the process of -- you were in the process of complementing, supplementing the 1986 project that we have been talking about, the coding, the summarization project. You said just a moment ago that you were in the process of taking post '86 documents and integrating them or supplementing them into a system; is that correct?

A. Yes.

Q. Is there a new system, or are you just adding it to the old system?

MR. BERNICK: Well, you know, at a certain point, this really gets pretty intimately into Brown & Williamson's efforts to deal with all the different cases that you're involved in, Mr. Motley. I think to the extent that --

MR. MOTLEY: Go ahead. I'm listening --

MR. BERNICK: -- your question calls, as I think it does, for the evolutionary aspect of the -- the evolutionary aspect of the data base, that really is work product.

MR. MOTLEY: I take it then you are

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instructing him not to answer that question?

MR. BERNICK: I would think there is a way -- I think you are probably getting at something in particular and maybe if you focus a little bit, we can get you an answer to your question. I don't want to be in a position where I am waiving some work product claim that applies more broadly to the litigation preparation effort.

So if there is something in particular --

MR. MOTLEY: Well, okay. Let's go off the record for a second, and I'll tell you what I'm trying to avoid.

THE VIDEOGRAPHER: Do you want to go off the video?

MR. MOTLEY: Well, just leave it on if you want to because it is just colloquy. It's not--

MR. BERNICK: Why don't you just turn it off?

THE VIDEOGRAPHER: We will go off the video record at 1:40.

(Off-the-record conference.)

THE VIDEOGRAPHER: We're back on the record 1:42 PM.

BY MR. MOTLEY:

Q. Before I leave the last subject, are

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there -- just yes or no -- have there been drafts of verbalizations of codes that succeed the '86 project brought to your attention?

MR. BERNICK: Drafts of verbalizations --

BY MR. MOTLEY:

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MR. BERNICK: Let us know when he suggests more, that way I can be sure to object again. See, there is another one. That's even worse.

BY MR. MOTLEY:

Q. Do you know what kind of software you used?

MR. BERNICK: For what?

MR. MOTLEY: For the new data base.

MR. BERNICK: You're assuming there is a new data base, and I'm not going to let the witness tell you if there is one.

MR. MOTLEY: Maury, don't you have an appointment somewhere? Would you like an appointment?

MR. HERMAN: I'm sticking with you like glue.

MR. MOTLEY: I would say you need a haircut, but that's not true.

MR. HERMAN: Saved by the bell.

(The proceedings were interrupted.)

BY MR. MOTLEY:

Q. Have you ever seen document that lists in a definitive, objective way, that is, Jones to Smith,

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December 3rd, 1989, without explanation of the contents of the document as to the 1500 documents referred to in Judge Sarokin's order?

MR. CARTY: Excuse me, can I -- I would just like that question read back.

MR. BERNICK: I --

MR. MOTLEY: Okay. Let's start over. Let's start over.

BY MR. MOTLEY:

Q. You and I both know, and we have discussed this, that Judge Sarokin makes reference repeatedly to a set of documents, 1500 in number approximately. Have you ever seen an objective list, that is, to and from whom, re what of those 1500 documents to which Sarokin refers?

A. It rings a bell. I can't picture it. I may have.

Q. Do you know whether such an objective listing is in the possession of Brown & Williamson?

A. I don't know.

Q. You realize that we have requested, among other things, the 1500 documents.

MR. MOTLEY: And I would ask counsel if we can avoid -- I know I'm over my limit.

MR. BERNICK: Way over your limit.

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MR. MOTLEY: Can avoid --

MR. BERNICK: Can we knock some of the others off.

MR. MOTLEY: I may trade one for two. If you have just an objective list, I would ask that you consider that in your privilege log, putting that in there so we can get rid of all of that at one time.

It would help me against your friends Phillip Morris and the others, and I know you want to help me with that.

(This page contains information to be supplied by counsel and/or the deponent.)

MR. BERNICK: You know, you are assuming, I think, that Brown & Williamson actually has possession of those 1500 documents. I don't even know that to be true.

MR. MOTLEY: I don't know that, either, but if the witness recalls vaguely having seen such a list and if you have got such a list, whether you give it to me or not, just let me know you've got it so I can pursue it. That's all I want to know.

BY MR. MOTLEY:

Q. Sir, did you review a paper by Dr. Blackman entitled The Controversy on Smoking and Health, Some Facts and Anomalies in October 1984? Do

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you recall that?

A. I think so, but just from memory, I can't be certain.

MR. MOTLEY: This will be the next number, please.

(PLF. EXH. 19, Letter from J. Kendrick Wells, III to H. A. Morini dated 10/25/84, was marked for identification.)

BY MR. MOTLEY:

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BY MR. MOTLEY:

Q. Okay. Mr. Wells, have you ever had any formal or informal training in epidemiology? And I think you know what that discipline of science is, do you not?

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A. Certainly no formal training. I have had some informal training to the extent I have read a number of epidemiologic reports. I have read all or parts of a handful of books about epidemiology.

Q. But as between you and a trained and practicing epidemiologist, you would certainly defer to his observations about the worthiness of an epidemiological study, would you not?

A. Not necessarily. And I can explain that. I think that --

Q. I'm happy with your feelings about it.

A. There are probably about -- well, there are problems that crop up in epidemiology, which in my opinion a common person can understand and sometimes pick out. I don't claim to be an expert. I can't pick out -- I can't do a comprehensive analysis of an epidemiological piece.

But I think a common person can understand when and certainly form an opinion that there is a problem in an epidemiologic report.

Q. Were there ever any written procedures adopted by BAT in connection with review by either the B&W law department or BAT law department --

MR. McLAUGHLIN: Objection to the form.

MR. MOTLEY: I'm not done quite yet. It

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may become more objectionable.

MR. McLAUGHLIN: I'm sorry. I'm sorry.

BY MR. MOTLEY:

Q. -- by the BAT legal department or the B&W legal department, policies for -- to be followed before an in-house BAT research project would be circulated?

MR. BERNICK: Circulated where?

MR. MOTLEY: Outside the company.

MR. McLAUGHLIN: Objection to the form.

THE WITNESS: I don't know about the British American, but you also asked about Brown & Williamson, and the answer is that in practice, no. And I'm saying that because I'm hedging. We've had some policies that say that publications going outside the company should be reviewed by counsel.

Those were never intended to include scientific research reports. Those were issued because public affairs and marketing people at the time had a bad habit of talking to the press without telling anybody about it. And that's what those policies were aimed at.

BY MR. MOTLEY:

Q. You are familiar, are you not, sir, with

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the July 19th, 1995 Journal of the American Medical Association publication which sets forth various scientists' views of the so-called Merrell Williams documents?

MR. BERNICK: Various scientists' views?

MR. MOTLEY: Yeah.

MR. BERNICK: Go ahead and answer the question.

MR. MOTLEY: Whether -- well, whether you think he practices voodoo science or appropriate science, Glantz holds a science degree, so...

THE WITNESS: My friend Mr. Bernick would like a voir dire, but you'd probably want to put that off.

BY MR. MOTLEY:

Q. I'm sure he could do a voir dire.

A. I'm familiar with the publication.

Q. And have you, sir, or at your request, have you commissioned any analysis of the various articles, any one or all of them, contained in this JAMA, July 19th, 1995 publication.

MR. BERNICK: You can instruct -- you can answer the question -- let me rephrase this. Withdraw it and rephrase it.

I believe because of who you are asking

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that question, any answer that the witness would have in that area would fall into the category of work in connection with litigation, and I would, therefore, instruct him not to answer the question to the extent that that's true.

BY MR. MOTLEY:

Q. Can you answer my question --

A. That's obviously directly involved with litigation.

Q. Well, let me ask you this: A moment ago you said that -- you made reference to public relations and marketing, and the involvement --

A. Yes.

Q. -- of counsel in reviewing things before they spoke in the public. I wish that kind of thing in the Castano group so we could keep Mr. Cole quiet from time to time.

But have you commissioned or been asked or have you delegated anyone else on the request of PR and marketing to analyze this JAMA article? Not the law department but --

MR. BERNICK: In other words, has he got a request from PR or marketing for an analysis of that?

MR. MOTLEY: Yes.

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MR. BERNICK: Again, I'll allow you to answer that question yes or no, but regardless of the source of the request, it is very intimately connected with litigation, and I think that the substance of any analysis or request would be work product, but you can answer the question yes or no.

THE WITNESS: This is a question directed to me personally or the law department?

BY MR. MOTLEY:

Q. First you and then the law department.

A. What's your concept of an analysis?

Q. Any thought process put to writing about the subject?

A. It could be a paragraph? You're not looking -- it doesn't have to be 15 pages long?

Q. Correct.

A. I may well have. I just can't picture anything specifically.

Q. Can you tell me whether your company, B&W, has commissioned a public relations firm to prepare thought pieces or talking point position papers based upon the JAMA article of July 19th, '95?

A. I don't know.

Q. Did BAT and B&W have a cost sharing agreement in regard to health claimed litigation in

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the United States?

MR. McLAUGHLIN: Object to the form.

MR. BERNICK: Object to what?

MR. MOTLEY: He objected to the form. I didn't object to the form of his objection.

MR. BERNICK: I just forgot -- cost sharing agreement on what?

BY MR. MOTLEY:

Q. Did BAT and B&W have a cost sharing agreement in connection with American, U. S. health claim litigation, smoking and tobacco -- I mean smoking and health?

A. Is this cost sharing you are thinking about in the way of sharing regarding litigation expenses? Or what costs are we sharing here?

Q. I don't know. That's why I asked you.

A. I don't know of a -- I don't know of a cost sharing agreement --

Q. Then let me ask it this way --

A. -- that pertains to -- that pertains specifically to smoking and health issues.

Q. Did BAT and B&W have a cost sharing agreement that pertained to scientific research conducted on biological activity or biological causation or smoking and health issues?

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MR. BERNICK: You know, you've got a whole bunch of things in there.

MR. MOTLEY: Well, I don't know what you call it. You know, sometimes I get --

MR. BERNICK: Why don't you ask him if there is a cost sharing agreement and see if he can answer the question.

MR. MOTLEY: Well, I want to know if there is a cost sharing agreement specific to biological research.

THE WITNESS: Not that I know of.

BY MR. MOTLEY:

Q. You are unaware then that Mr. Schechter had authored a cost sharing agreement between BAT and B&W in regard to research that was conducted by BAT on biological issues?

MR. BERNICK: You know, we gave you a chance, I thought, to ask a question about his understanding of the cost sharing agreement. You said, no, you didn't want that. You said, I want the cost sharing agreement specifically on the biological activity. And he said he didn't know it.

Now, you go back to what Schechter is talking about. Why don't you ask him if he knows about a cost sharing agreement.

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MR. MOTLEY: I don't know what I would do without you, David. Let's take his question and answer it.

THE WITNESS: If you're talking about research in general, there was a cost sharing agreement that continued for some years. Brown & Williamson Tobacco Corporation and British American were two parties -- two of the parties. It described the sharing of the total costs for funding what was identified as joint research conducted by the British American Tobacco Company.

And that was research across a range of matters of interest to a tobacco company. It certainly included bio -- biological work. But it included on the other end such things as what's the analysis of leaf on the market in Timbuktu, and how do you make a tobacco drying machine that will heat up to a specified temperature. That one agreement covered the whole range of research that was done on a joint basis.

BY MR. MOTLEY:

Q. Were any amendments to the cost sharing agreement, which you just identified for me, made after 1979, so as to permit BAT Company to claim work product privilege in American litigation?

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A. To claim work product privilege for what?

Q. Well, let me start over again. We've got a cost sharing agreement that you have just defined --

A. Yes.

Q. -- okay? At any time was that agreement changed for litigation, American tobacco and health litigation reasons?

A. Not that I am aware of. But let me say, not that I'm aware of. That's what I said.

MR. BERNICK: That's what you said.

BY MR. MOTLEY:

Q. Who is Dr. Esterle, E-S-T-E-R-L-E?

A. Dr. Esterle was one of the scientists in our R&D department.

Q. B&W's?

A. Yes. He is now retired.

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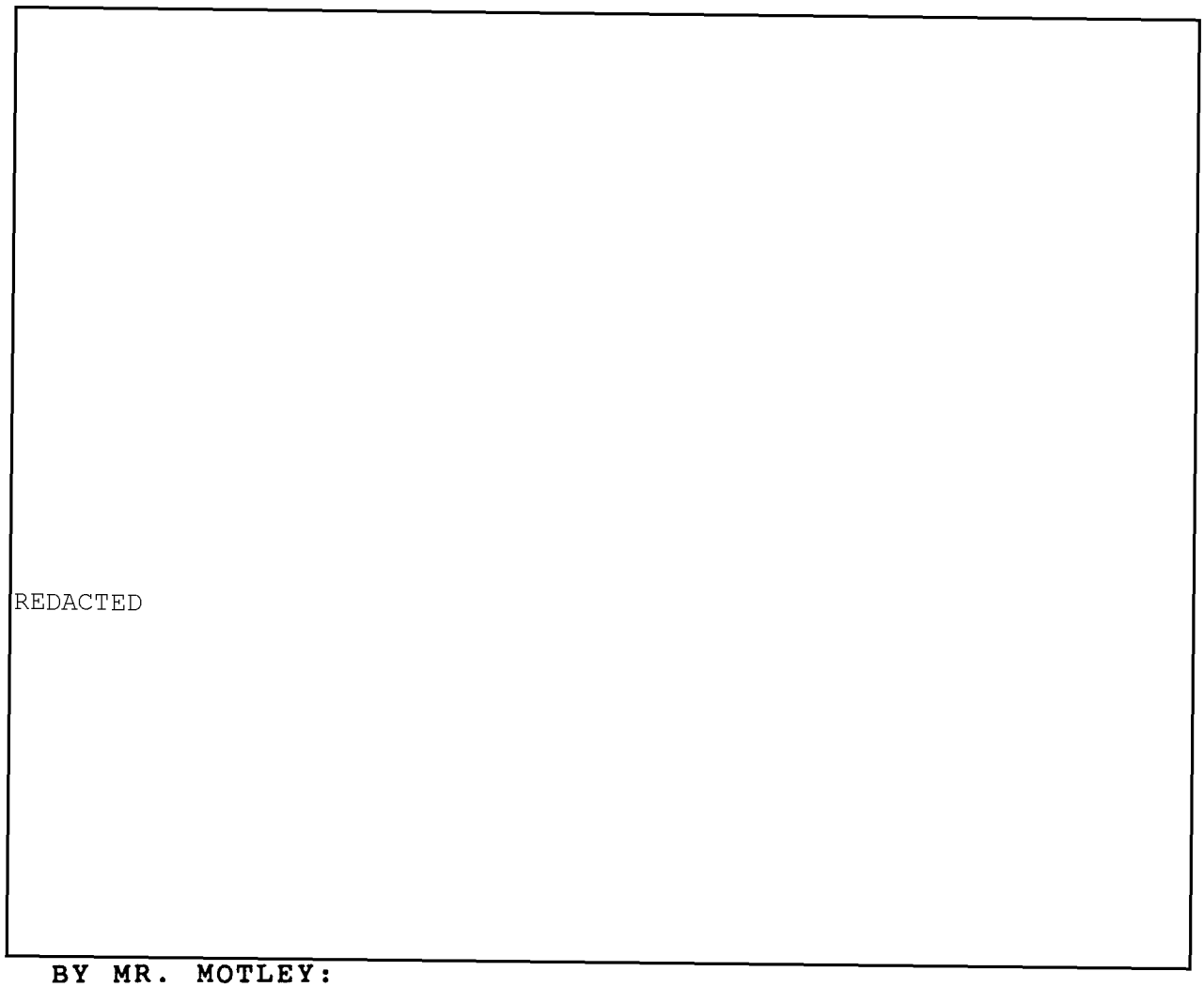

BY MR. MOTLEY:

Q. Did the law department ever control access to British scientific studies that were sent -- did the B&W law department ever control access within the company personnel, nonlaw, to research papers which were sent from Britain to the United States?

MR. BERNICK: So I'm clear, you're asking him if the law department controlled access by other people within the company --

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MR. MOTLEY: Nonlaw department personnel to research papers sent from Britain to the United States.

THE WITNESS: Not to my knowledge.

BY MR. MOTLEY:

Q. If I were a banker, and I were to say to you, I must continue to control access to treasury notes in order to maintain the financial viability of my company, would you as a person who understands modern English assume that prior to my making that statement, I had control over those treasury notes?

MR. BERNICK: Run that one by me again.

MR. MOTLEY: Read it back to him, please. I've got a reason for stating it that way.

MR. BERNICK: Uh?

MR. MOTLEY: I said I have a reason for stating it that way.

MR. BERNICK: I didn't say anything. I just need to hear the question read back. I was conferring with my partner here.

(The Court Reporter read the question commencing on page 367 line 6.)

THE WITNESS: I have to take that --

BY MR. MOTLEY:

Q. Go ahead, sir. I'm sorry.

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A. To answer the question literally, I think the answer has to be not necessarily.

Q. Okay. What scenario would you have that would say continued control over access to treasury notes could connote anything to the ordinary person who speaks the queen's language than that which I just said a moment ago?

A. There is no way to know in your hypothetical about banking or anything else whether someone meant that phrase in the way that you would interpret it. I think your interpretation of the word continued, as you would look at it in the dictionary, is probably correct. But people aren't -- I mean, people don't just say or write things to serve as the ten commandments for the next thousand years. They are often sloppy. They often say things they don't mean. So I'm not sure. I would not think --

Q. I have noticed that.

A. If I heard that statement, I would not take it at face value.

Q. You wouldn't? Okay?

MR. MOTLEY: Mark this one, please, sir. You will not find this one in that box.

(PLF. EXH. 20, Document titled

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Determination of p-Dichlorobenzene by GC-MS/130 dated 7/3/91, was marked for identification.)

(Off-the-record conference.)

MR. BERNICK: After we get done with this, can we take a short break?

MR. MOTLEY: Sure.

BY MR. MOTLEY:

Q. I cannot pronounce --

MR. MOTLEY: What number is this, Bill?

THE COURT REPORTER: 20.

MR. MOTLEY: 20.

BY MR. MOTLEY:

Q. -- the chemical that's referred to there, but it's commonly called PDB, is it not?

A. This memo indicates that it is.

Q. Okay. Do you know what PDB is?

MR. BERNICK: Other than what's set forth in the document?

BY MR. MOTLEY:

Q. Other than what's set forth -- well, do you generally know -- before I showed you that document, did you know what PDB was, sir?

A. I can't recall.

Q. Have you ever seen that --

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A. I knew, but I can't recall.

Q. Have you ever seen that document before?

A. Yes, I think I have.

Q. Have you ever -- do you recall seeing a 1992 memo regarding a nicotine delivery system?

MR. BERNICK: 1992 memo?

MR. MOTLEY: Uh-huh.

MR. BERNICK: Does it have something to do with this, or are we onto something new?

MR. MOTLEY: Onto something new. Moving on here.

THE WITNESS: Just in the way you have described it, I can't recall.

BY MR. MOTLEY:

Q. Have you ever seen a document, 1992 with the following quotation: If the Food and Drug Administration were ever to obtain jurisdiction over cigarettes, it would be virtually impossible to pass FDA screens?

A. I don't recall. The FDA has said that -- I can't -- I have seen that statement actually several times, Mr. Motley. I can't identify a document.

Q. Do you know FDA -- what is an FDA screen?

A. I don't have the document in front of me,

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so -- you haven't given it to me, but as I understand the meaning of that statement, it's referring to the food and drug law, which requires that if the FDA takes jurisdiction over a product, that product must pass a -- must be approved as -- by the FDA as passing a standard, legal standard, and that standard is -- I'm oversimplifying here -- something like, safe for use, or safe and effective for use or generally recognized as safe.

The precise safety statement depends upon which route of administrative the FDA takes it, but that's what I understand is a screen, is that legal standard.

Q. Sir, in exhibit 20, the following persons are copied on the document, which is dated July 3rd, 1991. Mr. Kohnhorst, we've already --

A. I'm sorry, exhibit 20 --

MR. BERNICK: He is holding it.

BY MR. MOTLEY:

Q. I've got it. I was going to read the names to you.

A. That was that --

Q. This is the PDB. Mr. Kohnhorst was a scientist?

A. Mr. Kohnhorst has been with the company a

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long time. He served in the R&D department at one time. He is no longer in that department now.

Q. When he was in that department, was he doing scientific functions?

A. I'm not sure. He may have been in more of a management capacity.

Q. Was he a lawyer?

A. No. He is trained -- he had background of engineering and development. What I'm not clear of is to what extent his career was more in engineering.

Q. Mr. D. S. Roth, R-O-T-H?

A. I can't remember Mr. Roth.

Q. Was he in R&D?

A. I just don't remember.

Q. D. L. Gordon?

A. That's David Gordon. He's in R&D.

Q. T. F. Riehl; that's the gentleman -- R-I-E-H-L -- you mentioned before?

A. That's correct.

Q. And he's in R&D?

A. Yes, that's correct.

Q. Mr. R. H. Honneycutt?

A. He's in R&D.

Q. D. W. Cantrell?

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A. Mr. Cantrell was in R&D at that time.

Q. Mr. J. H. Lauterbach, L-A-U-T-E-R-B-A-C-H?

A. Yes, Mr. Lauterbach is in R&D.

Q. S. G. Moldoveanu, Library, is that an R&D Library?

A. That sounds like the name of one of the library assistants. Yes, that would be the R&D library.

Q. C. A. Rouse, R-O-U-S-E?

A. I should know that name, but I can't recall.

Q. My understanding he was in R&D at least on July 3rd, 1991. You don't have any basis to dispute that, do you?

A. No, I take your word for it.

Q. And we know Jeffrey Wigand was in R&D?

A. Yes.

Q. There is one other name on here, Mr. J. K. Wells, III. That's you?

A. Yes.

Q. And you're a lawyer?

A. That's correct.

MR. MOTLEY: Did you want to take a break, David?

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MR. BERNICK: Yes.

THE VIDEOGRAPHER: We will go off the record at 2:35 PM.)

(A recess transpired.)

THE VIDEOGRAPHER: Back on the record 3:02 PM.

THE WITNESS: Mr. Motley, I regret, it just at this moment occurred to me that I gave you an incorrect answer. You asked whether Brown & Williamson had a facility in North Carolina other than Reidsville?

BY MR. MOTLEY:

Q. Yes, sir.

A. We do not have any facility connected with cigarettes and that was my thought pattern. We do have a facility in Winston-Salem at which smokeless products and pipe tobacco is manufactured.

Q. Okay. And that's in Winston-Salem?

A. That's correct.

Q. Let me ask you this question: The facility at Winston-Salem that makes pipe tobacco, does it make the type of pipe tobacco that may have at one time included the ingredient -- and I may not pronounce this correctly -- coumarin, C-O-U-M-A-R-I-N?

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A. That's my understanding.

Q. And do you know whether at any time in the last three years -- let me rephrase that -- since 1990, whether shipments of coumarin were received at night and taken out of the containers that they were normally stored in and placed in containers without reference to the fact that it had coumarin in it?

A. I have no knowledge of that.

Q. Do you know whether any shipments of coumarin were received in the Winston-Salem factory at night at any time?

A. I have no knowledge.

Q. Thank you. Let me -- and if I can go ahead with this, let me ask you: Were you in Washington at the so-called Waxman committee hearings in June of 1994 when Mr. Thomas Sandefur testified?

A. Yes, I was.

Q. And do you recall hearing Mr. Sandefur's testimony in regard to whether or not nicotine as it appears in cigarette products was addictive?

A. I did hear it.

Q. And you heard him say, I do not believe nicotine is addictive? And I'm quoting from the transcript.

A. I heard him say that and more.

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Q. Yes. But in addition to the more, he did say that?

A. He did say that. But I think it's fair to say what he was trying to put together there in a way that is concise --

Q. Can we get to that in a minute and let me pin this down first?

MR. BERNICK: Are we going to get to it though?

MR. MOTLEY: Well, yeah. Yeah. I even have a question that talks about it. I like it too. We both like it.

BY MR. MOTLEY:

Q. And counseling Mr. Sandefur when he made that statement that, I do not believe nicotine was addictive, was Mr. Griffin Bell?

A. Yes.

Q. Now, are you aware of any written documents authored by Mr. Sandefur when he was employed by Brown & Williamson from 1990 to -- up to the date of his testimony on June 23rd, 1994 in which he voiced the opinion or stated the opinion that it was his belief that nicotine was not addictive?

A. Excuse me. I don't recall any.

Q. Since he testified on June 23rd, 1994

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have -- to your knowledge, has the law department searched files to see if, in fact, Mr. Sandefur himself personally expressed such an opinion as that which he stated at page 139 of his Congressional testimony on June 23rd, 1994?

A. You asked about an investigation?

Q. Yes. I don't want -- I don't want to dignify it completely into an investigation. It may have just been just an inquiry or search or whatever.

MR. BERNICK: I don't know that the witness has any information about this at all. Why don't you ask him if he has any knowledge in the area? I'm probably going to have to instruct him not to answer the substantive question even yes or no. I don't know whether he has any knowledge in the area.

BY MR. MOTLEY:

Q. To your knowledge, sir, was any search made -- and I don't want to know what you found, at least not right at this minute -- was any search made of records to try to find a written document authored by Mr. Sandefur in which he stated nicotine is not addictive?

MR. BERNICK: Okay. And the problem is that that's a question about the process, but the

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process is so specific that it would reflect mental impressions and strategies of counsel, so I cannot permit him to answer that particular question. But if his answer is he has no knowledge in the area, then I want to have the witness to get an opportunity to say that and this is a nonissue. Can you just ask him if he has any knowledge in the area?

BY MR. MOTLEY:

Q. Do you have any knowledge in that area?

A. The question we are addressing is a records search?

Q. Yes.

MR. BERNICK: Yes.

THE WITNESS: I do not know.

BY MR. MOTLEY:

Q. Has Mr. Sandefur -- well, strike that. To your knowledge -- has it come to your attention that anyone outside the legal department has launched a search for documents authored by Mr. Sandefur in which he voiced that opinion, outside the legal department?

MR. BERNICK: Still that includes outside counsel, so --

MR. MOTLEY: Oh, well. Yeah, it does.

MR. BERNICK: So could we just find out

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if he has any knowledge in the area?

BY MR. MOTLEY:

Q. Do you have any knowledge?

A. No knowledge.

Q. Whether a search was conducted or not, has a document been dropped into your lap authored by Mr. Sandefur which says -- states his opinion voiced on June 23rd, 1994 that nicotine is not addictive?

MR. BERNICK: Apart from this transcript?

MR. MOTLEY: Yeah, apart from the transcript.

THE WITNESS: No document has been dropped into my lap that says that by Mr. Sandefur. It's a topic of conversation in the halls.

BY MR. MOTLEY:

Q. Sure.

A. No one thinks anything other than Tommy did not believe cigarette smoking is addictive.

Q. I appreciate that gratuitous comment. I was going to get to that in a minute. It doesn't surprise me that those conversations have occurred in the hall.

The reverse of the question I just asked you: Has anyone conducted a search for documents,

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wherein Mr. Sandefur may have voiced the opposite opinion, that is, nicotine is addictive?

MR. BERNICK: Again, can we have the same predicate inquiry? Do you have any knowledge in that area?

THE WITNESS: I have no knowledge of any search for Tommy Sandefur documents relating to the subject of nicotine. Did you put a time on that?

BY MR. MOTLEY:

Q. At any time.

A. Well, I don't know of any at least subsequent to the Waxman testimony.

Q. Well, are any documents in existence to your knowledge that predate the Waxman testimony in which he voices an opinion one way or the other about nicotine and its addictive nature?

A. I just don't recall that.

Q. You don't recall that. The same question about Dr. Jeffrey Wigand: Has anyone conducted a search to your knowledge of documents that he may have authored voicing an opinion that it was or was not addictive while he was employed by Brown & Williamson?

MR. BERNICK: Again, as a preliminary matter, do you have any knowledge in that area,

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Mr. Wells?

THE WITNESS: Yes.

MR. BERNICK: Okay. If you want to ask the question -- I'm going to instruct the witness not to address that because my assumption is -- of course, you can elicit whether it is in connection with legal department matters.

BY MR. MOTLEY:

Q. Is there a document that memorializes that search?

A. I don't have knowledge of documents that may or not be connected with that search.

Q. Let me make sure that you understood my question. What I want to know is, to your knowledge, is there a memo or document that says, let's launch a search, initiate a search, for all the written utterances of Dr. Jeffrey Wigand in regard to nicotine?

MR. BERNICK: I'm sorry -- I'm sorry, I wasn't focused. Could you just read that back, please?

(The Court Reporter read the question commencing on page 381 line 13.)

THE WITNESS: If I can be technical for a moment. If I answer that one, haven't I gone beyond

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what you said was privileged?

MR. BERNICK: Yeah. That's why I wanted to have the question read back.

MR. MOTLEY: You are instructing him not to answer, I take it?

MR. BERNICK: Yes, because I believe it was in connection with the legal department inquiry and ancillary to litigation. Now, there has been no testimony from the witness to that effect, but I believe if that's true, you are entitled to probe whether that is true or not.

BY MR. MOTLEY:

Q. Well, is what he said -- just said true?

A. That's correct.

Q. Are there any fruits of that probe, that is, documents?

MR. BERNICK: Well, again, that question assumes the existence of the probe. The witness is instructed not to answer questions in that area because given how you have styled that probe, the probe itself would reflect work product. I don't think the way to slice up the area is --

BY MR. MOTLEY:

Q. Well, I don't want to know what the document says necessarily, but is there a document

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that addresses the question I just asked you, that is, did Dr. Wigand utter a belief or opinion while he was employed by Brown & Williamson -- which I think, by the way, I'm entitled to get as an 801 (d) admission either in favor of or against his interest -- is there a document while he was head of R&D where Dr. Wigand uttered an opinion or belief that nicotine was addictive while he was employed by Brown & Williamson, irrespective of who found it?

A. I can answer that on a knowledge basis. I do not know. If I have seen such a document, I don't recall.

Q. In other words, sir, if I -- if a Request to Produce all R&D documents relating to addiction has been posed to your company, is there a document authored by Dr. Jeffrey Wigand which addresses his belief or opinion as to the addictiveness or nonaddictiveness of nicotine while he was employed by Brown & Williamson as vice president of research and development?

MR. BERNICK: I --

MR. MOTLEY: I don't know how that is so hard. He works for -- he was the vice president of R&D. He is a managerial agent. 801 (d) applies to him and if he made statements in regard to nicotine

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which is an issue of addictiveness in the Burl Butler case and we requested things such as that, and we did, then I want to know if somebody asserts for it; and if they have, have they found a document while he was employed.

MR. BERNICK: The reason I'm mystified by it, quick, I thought he just told you in response to an earlier question he wasn't aware of documents that fell into that category.

MR. MOTLEY: He then said I don't recall, and he is the one who answered these responses. So I want to know if there is such a document and if you are claiming a privilege to it, I think I'm entitled to know that, a privilege to the document.

MR. BERNICK: It sounds to me like we've just exhausted what this witness has knowledge of because he said, I don't know; I don't recall. We are past that, and now we are to the point of whether you want some fuller response to what you want to pose, an 801 (d) request or something like that and whether the company knows anything more than the witness does.

MR. MOTLEY: Okay.

BY MR. MOTLEY:

Q. Well, I would like to know then who was

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assigned to respond to my request of production of all R&D documents relating to nicotine and addiction. Did you assign anyone to do that, sir, since you signed the interrogatories?

A. This is in the --

Q. Butler case.

A. -- case of Burl Butler?

Q. Yes, sir.

A. It would have been King and Spalding.

Q. Who at King & Spalding then would have knowledge of whether or not a document has been discovered that would express the opinions of Dr. Wigand in regard to the addictiveness or nonaddictiveness of nicotine?

A. Bill Hoffman.

(Off-the-record conference.)

MR. BERNICK: As soon as you send us that request, are you going to send us all your Wigand documents?

MR. MOTLEY: I haven't received any documents from Dr. Wigand.

MR. BERNICK: No, no. All of your Wigand documents. I don't care where you got them.

MR. MOTLEY: Well, if you make a request and the judge says I've got to give them to you, I'll

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deal with it at the time.

MR. BERNICK: You are going to make a request of us for those documents --

MR. MOTLEY: No, I'm going to move to compel because I've already requested them.

MR. BERNICK: Well, whatever you're going to do. You want all of our Wigand documents, but you are not prepared to give us yours without our going to the Court and getting an order?

MR. MOTLEY: No, I won't say that.

MR. BERNICK: That's all I'm asking you, Ron.

MR. MOTLEY: Well, then, next week when we call, maybe in the spirit of mutual cooperation, we will meet somewhere and exchange unmarked bags or something.

MR. BERNICK: That's fine. I just want mine to have all the --

MR. MOTLEY: Merrell Williams will be my courier; who's yours? Okay. All that is in gist in case no one recognizes it.

MR. BERNICK: Let the record reflect, I thought Mr. Motley was speaking in dead earnest.

MR. MOTLEY: No. No. I'm talking about who the courier might be.

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BY MR. MOTLEY:

Q. Mr. Sandefur testified further --

MR. MOTLEY: Have we not heard back from the efforts to find our judge?

MS. McGREGOR: No.

BY MR. MOTLEY:

Q. Mr. Sandefur also--

MR. BERNICK: Is it going to --

MR. MOTLEY: Have we been able to locate the judge.

MS. FLOWERS: Yes. He is stuck in a snowstorm.

MR. MOTLEY: Oh. Does he have a phone so we can -- apparently, his secretary --

THE VIDEOGRAPHER: We will go off the video record at 3:17.

(Off-the-record conference.)

THE VIDEOGRAPHER: We're back on the record 3:18 PM.

MR. MOTLEY: The Plaintiffs object to proceeding further with the deposition at this time. We have not completed the deposition. We have had numerous objections based on privilege, which we think are not well founded.

There are numerous areas that we were

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precluded from going into, one of which was opened back up to us after lunch relating to the New Orleans grand jury matter --

MR. BERNICK: I think there was also one more.

MR. MOTLEY: There may have been. When you are having a good time like I am, you just -- your mind boggles,.

MR. BERNICK: Right. Just roll on, yeah.

MR. MOTLEY: We object on several grounds:

Number one, it would be a truncated deposition by the Plaintiff interrupted by a direct examination of the witness before cross-examination was completed. We object to that procedure. We have stated our position that we want to complete our examination before there is an examination of Mr. Wells, and we are going to seek a ruling from the Court on the privilege assertions and also on the assertion that we're limited to the 31st and the 1st or are limited in corporate party depositions to three hours, which counsel is not insisting upon, although he has stated that that is a position he is not waiving, and I don't suggest that he has waived it.

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We have just been advised that the Court, through, I guess his secretary -- that the Court wishes to view the transcript of what's taken place these two days before we have a hearing on matters related to the deposition. And particularly in light of that last communication, assuming it's correct, we feel that it would be improper to go forward at all with any more questions, be it on nonprivileged matter by me or on matters by counsel for Brown & Williamson, and because I am accepting the veracity of what was said to me about the judge's wishes, I'm not going to ask any more questions, and I'm going to -- we -- for the record, on three different occasions, we have alerted the judge's secretary that there may be a need for a hearing because of matters that have arisen.

We have either sloughed them off or worked them out; and I'm just not going to -- personally run the risk of offending the judge by going forward. And so we're terminating or recessing our portion of the deposition to -- I'm leaving. If counsel wishes to ask the witness questions in our absence, here a faint echo in the hall objecting every time a question is asked. I'm not going to be here.

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So I'm not going to get in trouble with the judge by continuing. So that's my position.

MR. BERNICK: Well, our position, while you are still here, Mr. Motley, is that the deposition was originally set for three days, Wednesday, Thursday, and Friday of this week, and I have all this information from counsel in the case. It was cut down to two days at the request of the Plaintiffs. The notice specifically in the Butler case was for a two-day deposition to take place yesterday and today. The deposition has proceeded.

There is further correspondence that is contemporaneous with the deposition notice from Mr. Hoffmann to your local counsel, and we'll mark this as exhibit 21?

THE COURT REPORTER: Do you want to make it Defendants' 21?

MR. BERNICK: Just make it Defendant 1 is fine.

(DFT. EXH. 1, Fax Letter from William E. Hoffmann, Jr. to Cynthia Langston Miller dated 1/25/96, was marked for identification.)

MR. BERNICK: And in this letter, which is now Defendants' 1, dated January 25 from Mr.

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Hoffmann to Cindy Miller, confirmation is given of the conversation in which the deposition of Kendrick Wells in the Butler case was discussed. The deposition would begin on Thursday, February 1 at 9:30 rather than on January 31 as indicated in the notice. This is consistent with the notice in the Moore case. That the deposition will continue on Friday, February 2nd if necessary but will be completed no later than the end of business on Friday, February 2.

The letter further goes on to say, quote:

Please let me know immediately if you disagree with anything in this letter, period, closed quote.

We have participated in this deposition on the basis of these representations. I will note further that the trial scheduling order in the case provides for only three hours for a fact deposition. We have obviously far exceeded that limit.

We are prepared to proceed with the deposition as originally noticed and as represented to us by Ms. Miller on behalf of the Plaintiffs in the Butler case.

Of course, no disrespect is shown to the

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Court at all in this position. Obviously, to the extent that counsel wants to pursue privilege issues with the Court, counsel is free to do that, and we will, of course, recognize the Court's desire to have a transcript in connection with that process.

But indeed particularly because Plaintiffs intend to proceed with a hearing before the court, we believe it is critical to have a full record. Absent a full record, there can be no complete and proper determination regarding privileged issues because there is testimony that would bear upon those privileged issues that's critical to a determination of those privileged issues by the Court.

So particularly, Counsel, if you intend to proceed before the judge, it is critical that we continue to conduct our examination of this witness in order to offer further predicates for the privileges that have been asserted. I'm frankly very surprised that you would want to transmit to the Court a transcript which you are assuring by your leaving this deposition will be incomplete insofar as at least your attendance is concerned.

So we're going to proceed with the deposition. If you don't want to be here, I think

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there is disrespect being shown to the Court but it is not by the Defendants in the case.

MR. MOTLEY: I would suggest, sir, that if you want to place Mr. Wells' views before the Court that you could do so in the form of an affidavit. And we would like to place into the record as the next number, 21, Mr. Gordon Smith's representations made before Judge Myers at the hearing in the State of Mississippi case on January 29th, 1996, so the Court will have that available when the Court reviews this matter.

And so it's clear to you, sir, I am not done even with nonprivileged matters, but I am going to act in respect to what I understand to be the judge's wishes, and I'm not going to ask any more questions. And the judge is the sole, I guess, decider of what his wishes are.

MR. BERNICK: There has been no representation by counsel --

MR. MOTLEY: Let him mark this, please.

(PLF. EXH. 21, Hearing transcript before the Honorable William H. Myers dated 1/29/96, was marked for identification.)

MR. MOTLEY: My understanding was the judge didn't want to hear any more about this

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deposition until he had a transcript, and I'm not going to continue to ask questions and create problems in the future if that's what his desires are. I don't know that. I haven't talked to him. And I don't know that-- I know that none of us have talked to him, but we talked to the secretary.

MR. HEWES: My understanding is what she said is the judge wanted to have a transcript so he could rule on the privilege objections that were made.

MR. MOTLEY: No, sir, there were more than privilege objections made. There have been statements made previously and again here that this deposition was to terminate after two days. It's not just a privileged matter.

MR. BERNICK: But the two days haven't even been exhausted.

MR. HEWES: And we are prepared to go to five o'clock --

MR. MOTLEY: I understand.

MR. HEWES: -- and have been all along.

MR. MOTLEY: I have stated earlier and I state again, this is going to be at least a four- or five-day deposition venture, period. And if your deposition is as you have stated it, that failure to

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respond to Mr. Hoffmann's letter ties us to two days, and you have stated earlier that that was your position, and now you have put in an exhibit to memorialize that, we are at an impasse on that in addition to the privilege matters.

And I can state for the record, Mr. Hewes, that I have and will demonstrate if permitted later many more hours, more than two of nonspecial projects questions to ask that arise from the deposition -- excuse me, the box of documents of Merrell Williams, and there is no way I could complete it in two hours, and so I'm stopping. I'll suffer the consequences of stopping, I understand that, if there are consequences to be visited upon me.

MR. BERNICK: Let me ask you something, Counsel. Why is it that recognizing your position that you are not prepared to stay and hear the examination, and if you believe that the examination is improper, you move to strike? You have lost nothing.

MR. MOTLEY: I'm going to do that anyway, sir. I just think by staying here and letting you put whatever it is that you are going to put on this record, I will run the risk of violating the wishes

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of the Court, number one.

Number two, I suspect that you may be trying to get something that you can put on the five o'clock news, and I'm not going to countenance that because I don't know why you can't do what you want to do by an affidavit, to which I have no objection. So that's all I'm saying.

There is no use for us to go back and forth. We're having an honest agreement, guys. That's what you pay your lawyers so well to do.

(Off-the-record conference.)

THE VIDEOGRAPHER: Go off the record at 3:28 PM.

(Off-the-record conference.)

(The following proceedings transpired off the video record.)

MR. BERNICK: Let the record reflect that Mr. Motley is apparently now leaving the room, and we have no representation of exactly what was said by the Court. It looks like the termination of the deposition.

(Off-the-record conference.)

(A recess transpired.)

(The following proceedings transpired on the video and stenographic records.)

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THE VIDEOGRAPHER: We're back on the record 4:18 PM.

MR. BERNICK: This deposition has been terminated by the Plaintiffs and the Plaintiffs are no longer present; and, therefore, we are unable to proceed with the completion of Mr. Wells' deposition at this time. In light of the claims made by Plaintiffs' counsel, in light of our inability to pursue the deposition at this time as a deposition, we will have to be content with submitting an affidavit to the Court that would cover any additional matters that are appropriate for purposes of any hearing that's going to be held by the Court.

So that affidavit will be submitted, as Mr. Motley indicated would be satisfactory to him. We obviously would prefer to proceed with the deposition, but we aren't able to do so. That's it.

THE VIDEOGRAPHER: We will close the video record at 4:20 PM.

(The deposition was recessed at 4:20 PM.)

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SIGNATURE OF DEPONENT

I, the undersigned, J. KENDRICK WELLS, III, do hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

_____

J. KENDRICK WELLS, III Date

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CERTIFICATE OF REPORTER

I, A. William Roberts, Jr., Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing deposition was taken before me on the date and at the time and location stated on page 1 of this transcript; that the witness was duly sworn to testify to the truth, the whole truth, and nothing but the truth; that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed by computer-aided transcription; that the foregoing deposition as typed is a true, accurate, and complete record of the testimony of the witness and of all objections made at the time of the examination.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

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Witness my hand, I have hereunto affixed my official seal this 5th day of February, 1996 at Charleston, Charleston County, South Carolina.

A. William Roberts, Jr.
Registered Professional
Reporter, CP, CM
My Commission expires
May 22, 2001

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